IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WANDA SOUTHARD,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 97-CV-778K(M)
	)	
TOWER MARKETING, INC.	)	
	)	
Defendant.	)	

ORDER GRANTING
STIPULATION OF DISMISSAL WITH PREJUDICE

This matter comes before the Court upon the parties' Fed. R. Civ. P. 41(a)(1)(ii) Stipulation of Dismissal with Prejudice of all claims and causes of action heretofore asserted by Plaintiff Wanda Southard in this cause. The Court finds that the Stipulation of Dismissal with Prejudice is by all parties to this suit and is GRANTED. Therefore, it is hereby

ORDERED that all claims and causes of action heretofore asserted by Plaintiff Wanda Southard in this cause against Defendant Tower Marketing, Inc. are hereby dismissed with prejudice.

Costs are to be taxed against the party incurring the same.

All other relief not provided for herein is DENIED.

SO ORDERED this 9 day of November, 1998.

US DISTRICT COURT JUDGE

Submitted by:

R. Lawrence Roberson, OBA 14076
5555 S. Peoria Avenue
Tulsa OK 74105-6840
918-712-1994
ATTORNEY FOR PLAINTIFF

15

AGREED AS TO FORM AND SUBSTANCE:

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AND

LYNN STODGHILL MELSHEIMER & TILLOTSON, L.L.P.
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ATTORNEYS FOR DEFENDANT TOWER MARKETING, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRANCOISE WASS BOWE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 98-C-285-K
	)	
HUGHES LUMBER COMPANY,	)	
	)	
Defendant.	)	

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 6 day of November, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOROTHY KEY, Plaintiff, vs. JOHN CALLAHAN, Acting Commissioner, Social Security Administration, Defendant.	)	No. 96-C-475-K

JUDGMENT

In accordance with the Order entered September 23, 1997, adopting the Report and Recommendation of the Magistrate Judge, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant and against the Plaintiff.

ORDERED this 6 day of November, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LIMITED GAMING OF AMERICA, INC.,	)
	)
PLAINTIFF,	)
	)
VS.	) CASE NO. 98-CV-0134-K (E)
	)
DORAN, WALTERS, ROST, SELTER & WOLFE, A FLORIDA GENERAL PARTNERSHIP, THEODORE R. DORAN P.A., LAWRENCE G. WALTERS P.A., SCOTT R. ROST P.A., AARON R. WOLFE P.A., AND THEODORE R. DORAN, LAWRENCE G. WALTERS, SCOTT R. ROST AND AARON R. WOLFE, INDIVIDUALLY,	)
	)
DEFENDANTS.	)

STIPULATION OF DISMISSAL AS TO MARY F. SELTER

COME NOW the parties herein, pursuant to counsel, pursuant to Fed.R.Civ.P. 41(a)(1)(ii) and hereby stipulate to the dismissal without prejudice of this action as to the Defendant, Mary F. Selter, individually.

DATED this 3rd day of November, 1998.

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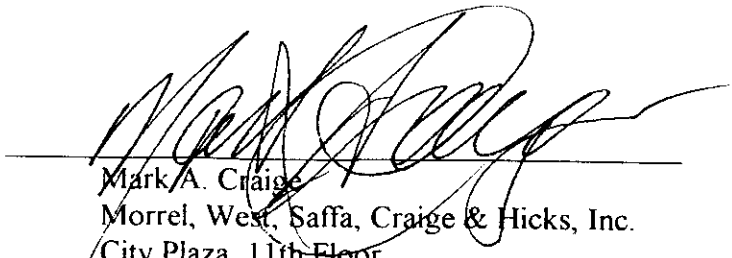
Attorneys for Plaintiff



Mark A. Craige
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Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 9 - 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

OKLAHOMA MUNICIPAL POWER AUTHORITY, an agency of the State of Oklahoma,

Plaintiff,

vs.

SOUTHWESTERN ELECTRIC POWER COMPANY, a Delaware corporation,

Defendant.

Case No. 98-CIV-0063-BU(W)

ENTERED ON DOCKET
DATE NOV 10 1998

ADMINISTRATIVE CLOSING ORDER

This matter comes on for consideration on the Joint Motion for Administrative Closing ("Motion") filed by Plaintiff, Oklahoma Municipal Power Authority, and Defendant, Southwestern Electric Power Company, on October 30, 1998. In the Motion, the moving parties have advised the Court of their agreement to facilitate negotiations which, if successful, will resolve the dispute and have requested that this case be administratively closed to permit the negotiations.

IT IS HEREBY ORDERED that this case is administratively closed until March 1, 1999. If either of the parties has not requested the reopening of this case on or before March 1, 1999, Plaintiff's action and Defendant's counterclaims shall be deemed dismissed with prejudice.

IT IS FURTHER ORDERED that to facilitate negotiations, the parties may not request the reopening of this case until February 16, 1999.

Dated: ~~October~~ Nov 9th, 1998.

Michael Burrage
UNITED STATES DISTRICT COURT JUDGE

568418

(27)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Plaintiff,

v.

ROBERT E. FRANDEN,

Defendant.

Case No. 98-CV-0595E(J)

ORDER

On this 9th day of November, 1998, there came on before this Court the Stipulation of Dismissal signed by the parties to the above referenced action.

This Court finds this action should be dismissed with prejudice.

IT IS THEREFORE ORDERED that the above referenced action is hereby dismissed with prejudice.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAMELA D. GREENWOOD,

Plaintiff,

v.

UNIVERSITY OF OKLAHOMA, by and through, BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA and ROGERS UNIVERSITY, by and through, BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA,

Defendant.

Case No. 98-CV 0518 E

ORDER

NOW on this 9th day of ~~October~~ November, 1998, comes on for consideration the Stipulation for Dismissal filed by the parties above-captioned action. It is hereby ordered that the above-captioned case is dismissed without prejudice to its refiling.

UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALICE REBECCA WALLACE, Individually and as Administrator of the Estate of JOSHUA JON-JOSEF LUNA, deceased,

Plaintiff,

vs.

THE CITY OF TULSA, State of Oklahoma a Municipal Corporation; RONALD PALMER, Tulsa Chief of Police; Tulsa Police Officers, O'KEEFE, JOHN DOE, and UNKNOWN OTHERS, Tulsa Police Officers, in their individual and professional capacities,

Defendants.

No. 97-C-744-E (M)

ORDER OF DISMISSAL

This matter comes on for hearing on October 9, 1998. Plaintiff was specifically directed to appear, or have her case dismissed without prejudice. Plaintiff failed to appear, and this matter is DISMISSED without prejudice to its refiling.

SO ORDERED this 6th day of November, 1998.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LYMON WILLIAMS,
SSN: 445-64-0371

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-CV-953-J

JUDGMENT

This action has come before the Court for consideration, and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 5 day of November 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

(12)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LYMON WILLIAMS,
SSN: 445-64-0371

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-CV-953-J

ORDER[2/]

Plaintiff, Lymon Williams, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff asserts that the Commissioner erred because (1) the ALJ applied an improper standard in concluding that although Plaintiff was disabled for a period of time, he was not disabled after August 18, 1994, and (2) the ALJ did not properly evaluate Plaintiff's credibility. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

[2/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[3/] Administrative Law Judge Leslie S. Hauger, Jr. (hereafter "ALJ"), in a decision dated April 18, 1996, concluded that Plaintiff was disabled from May 6, 1993 until August 18, 1994, but not after that date. [R. at 11]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on August 18, 1997. [R. at 6].

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I. PLAINTIFF'S BACKGROUND

Residual Functional Capacity ("RFC") assessments dated June 16, 1994, and December 28, 1994, indicated that Plaintiff could occasionally lift twenty pounds, frequently lift ten pounds, stand or walk for six hours and sit for six hours. [R. at 35].

Plaintiff indicated that he sometimes visited with his brothers or sisters, that he drove his son to school each day, and that he relied on his son to do housework. [R. at 103].

Plaintiff was admitted for complaints of chest pain on June 23, 1992. [R. at 120]. The tests indicated that Plaintiff had normal heart function. [R. at 121].

Plaintiff was seen by Karl Detwiler, M.D., on September 1, 1993. Dr. Detwiler indicated that Plaintiff would benefit from a laminectomy, and that his impression was that Plaintiff had left S-1 radiculopathy secondary to a left L5-S1 herniated nucleus. [R. at 174-75].

Plaintiff had the surgery. Four months later, on January 19, 1993, Dr. Detwiler indicated that Plaintiff was making good progress, that Plaintiff was ambulating well, and that Plaintiff had normal strength and reflexes. [R. at 177].

On January 11, 1994, Plaintiff told his therapist that he was doing "so-so." [R. at 297]. The physical therapist noted that Plaintiff's gait was normal and coordinated. [R. at 297].

On October 18, 1994, Plaintiff's doctor indicated that Plaintiff had "some back and leg pain, though he has no new motor, reflex or sensory deficits. His fusion is solid." [R. at 193].

Plaintiff's treating physician, on March 23, 1994, indicated that Plaintiff could return to work on March 17, 1994. Plaintiff was restricted to no frequent carrying of over 35 pounds, and only occasional stooping and bending. [R. at 194, 195].

On February 22, 1994, Plaintiff reported to Neurological Surgery Inc., that his maximum duration for standing was 40 minutes and his maximum duration for sitting was 30 minutes. [R. at 238]. On May 6, 1993, at the beginning of his "work hardening" treatment, Plaintiff reported being able to sit for ten to fifteen minutes and being able to stand the same amount. [R. at 240].

On April 25, 1995, an electromyogram revealed results compatible with mild left S1 radiculopathy. [R. at 262]. The interpreter noted that it suggested Plaintiff may have some ongoing compression in his left S1 nerve root. [R. at 262].

On May 12, 1995, Dr. Detwiler wrote that Plaintiff complained of pain in the back and left leg. He noted that Plaintiff's range-of-motion remained unchanged, that Plaintiff used a cane, that Plaintiff had negative straight leg raising, and that his strength was normal at all times. The doctor interpreted the lumbar myelogram from May 8, 1995, as showing no evidence of compression of the nerve roots at any point, and indicated that this was confirmed by a post-myelogram. He concluded that Plaintiff would not further benefit from surgical intervention. He noted that Plaintiff appeared to have a mild left S1 radiculopathy but that there was no compression. "At this point, I believe Mr. Williams has reached maximal medical improvement. However, I do not feel he can return to his former type of employment. My recommendation is that Mr. Williams undergo vocational evaluation and subsequent

retraining for a job that requires less lifting and more sedentary activity. As I have nothing to offer Mr. Williams further, I have discharged him from further follow-up care." [R. at 285-86].

Plaintiff complained of low back pain on January 10, 1996. [R. at 268]. Plaintiff was treated for hemorrhoids. The doctor additionally noted that Plaintiff had a very bad diet and he encouraged Plaintiff to increase his water and fiber intake. The doctor prescribed Ultram as needed for pain.

A medications list signed March 6, 1996, indicated Plaintiff was, at that time, taking no medications. [R. at 267]. A medications list on March 28, 1996 indicated that Plaintiff was taking Hyzaar (blood pressure), Oruvail (pain), Tylenol, and Advil. [R. at 269].

Plaintiff testified at a hearing before the ALJ on March 28, 1996. Plaintiff was born on December 12, 1959, and at the time of the hearing before the ALJ was 36 years old. [R. at 322].

According to Plaintiff he is unable to work because of low back pain, leg pain, and neck pain. [R. at 323, 325]. On a scale of one to ten Plaintiff rated his pain at an eight. [R. at 325].

Plaintiff testified that he drives regularly. [R. at 323]. Plaintiff testified that he drives his son to school each day, that he washes dishes and vacuums, and watches television. [R. at 327]. According to Plaintiff, he can lift ten to fifteen pounds, stand five minutes, walk thirty to forty minutes, and sit fifteen to twenty minutes (before needing to switch positions). [R. at 327].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.[4/] See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by

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[4/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[5/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

5/ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff was disabled beginning May 6, 1993, until August 18, 1994, and was not disabled after this date. [R. at 15]. The ALJ noted that Plaintiff's treating physician wrote on March 23, 1994, that Plaintiff was disabled from September 9, 1993 until March 17, 1994. On March 17, 1994, Plaintiff was released to turn to work with no frequent lifting over 35 pounds and only occasional stooping and bending. [R. at 16]. The ALJ noted that Plaintiff continued to complain of pain but that Plaintiff's surgeon, Dr. Detwiler, found normal strength and no further disc herniation on may 12, 1995. [R. at 17]. The ALJ discounted Plaintiff's credibility, and concluded, based on the testimony of a vocational expert that Plaintiff was not disabled.

IV. REVIEW

LEGAL STANDARD: MEDICAL IMPROVEMENT IN A CLOSED PERIOD CASE

In a typical social security case, benefits are granted for an indefinite period. That is, benefits continue unless they are terminated in a proceeding brought by the Secretary at some later date. After much wrangling in the federal circuit courts of appeal, it is now clear that the "medical improvement" standard, now codified at 20

C.F.R. § 404.1594, is to be applied in a proceeding to terminate benefits. Brown v. Sullivan, 912 F.2d 1194, 1196 (10th Cir. 1990).

A question not yet answered by the Tenth Circuit Court of Appeals is whether the "medical improvement" standard applies in a closed period case.

> In a 'closed period' case, the decision maker determines that a new applicant for disability benefits was disabled for a finite period of time which started and stopped prior to the date of his decision. Typically, both the disability and the cessation decision are rendered in the same document.

Pickett v. Bowen, 833 F.2d 288, 289 n.1 (11th Cir. 1987). Plaintiff argues that a closed period case consists of two distinct parts -- a disability determination and a termination of benefits. Plaintiff argues, that because the ALJ initially found Plaintiff disabled and subsequently determined Plaintiff was no longer disabled, the ALJ was required to show that Plaintiff had sustained a "medical improvement." Plaintiff asserts that the burden of proof is on the Commissioner to establish that Plaintiff has undergone a medical improvement.

A split of authority exists on this issue. Compare Chrupcala v. Heckler, 829 F.2d 1269, 1274 (3rd Cir. 1987) (holding that "[f]airness would certainly seem to require an adequate showing of medical improvement whenever an ALJ determines that disability should be limited to a specific period.") with Ness v. Sullivan, 904 F.2d 432, 434 n.4 (8th Cir. 1990) (holding that the normal sequential evaluation process and not the medical improvement standard applies in closed period cases).

The Court is not compelled to resolve the issue of whether 20 C.F.R. § 404.1594, the "medical improvement" standard, applies to closed period cases.

Initially, the Court concludes that a substantially different result would not occur in this case regardless of whether the traditional five step sequential evaluation process or the medical improvement standard was applied. In any event, the record indicates that whether he was required to or not, the ALJ did make the findings required by 20 C.F.R. § 404.1594. The ALJ wrote:

> The medical evidence shows that the claimant was unable to perform sedentary work commencing May 6, 1993. The claimant's treating physician released him to work on March 17, 1994, which demonstrates medical improvement. However, recuperation normally takes a year from the date of the surgery; therefore, medical improvement is demonstrated on August 18, 1994, one year form [sic] the date of the claimant's fusion. The medical evidence commencing August 18, 1994, shows that the claimant sought medical treatment infrequently. The objective tests were negative though the claimant had some spasms. While the medical evidence shows that the claimant is capable of performing work-related activities in excess of a sedentary level, a sedentary level of work is more consistent with prolonged performance of work.

[R. at 18-19] (emphasis added).

Pursuant to 20 C.F.R. § 404.1594, the following evaluation process must be followed to terminate disability benefits:

1. Is the claimant engaged in substantial gainful activity? [Step one of the traditional sequential evaluation process]. If he is, disability benefits will be terminated.

2. Does the claimant have an impairment which meets or equals the severity of an impairment in the "Listings"? See 20 C.F.R. Pt. 404, Subpt. P, App. 1. [Step three of the traditional sequential evaluation process]. If he does, disability benefits will be continued.

3. Has the claimant experienced "medical improvement"? If not, disability benefits continue.

   a. Medical improvement is defined as "any decrease in the medical severity" of the claimant's impairments since the last disability determination. "A determination that there has been a decrease in medical severity must be based on changes (improvement) in the symptoms, signs and/or laboratory findings associated with [the claimant's] impairment(s)." 20 C.F.R. § 404.1594(b)(1).

   In this case the ALJ determined that Plaintiff had experienced "medical improvement."

4. Looking only at the impairments present at the last disability determination, has the claimant's medical improvement resulted in an increase in the claimant's residual functional capacity ("RFC") since the last disability determination? If not, disability benefits will continue?

   The ALJ concluded that Plaintiff's RFC had increased and that Plaintiff, after August 18, 1994, had the ability to perform sedentary level work.

5. Do any exceptions to the application of the medical improvement standard apply? If an exception applies, the Secretary is relieved of her burden of showing medical improvement, and disability benefits will be terminated. None of the exceptions are applicable in this case. See 20 C.F.R. § 404.1594(d) and (e).

6. Looking at all of the claimant's current impairments, not just those present at the last disability determination, are these impairments severe? [Step two of the traditional sequential evaluation process]. If not, disability benefits will be denied.

7. Looking at all of the claimant's current impairments, not just those present at the last disability determination, can claimant perform his past relevant work? [Step four of the traditional sequential evaluation process]. If claimant can, disability benefits will be terminated.

8. Looking at all of the claimant's current impairments, not just those present at the last disability determination, does claimant have the RFC to perform an alternative work activity in the national economy? [Step five of the traditional sequential evaluation process].

20 C.F.R. § 404.1594(f). Although some differences exist, the framework for determining medical improvement is essentially the same for determining whether or not the individual is disabled. The ALJ concluded, at Step Five, and based on the testimony of a vocational expert, that Plaintiff was not disabled.

Plaintiff asserts that the Commissioner has the burden of proof to establish medical improvement, and that the ALJ did not meet this burden. Plaintiff states that the ALJ "relied primarily on his personal observation that 'recuperation normally takes one year from the date of surgery.'" Plaintiff's Brief at 3. Plaintiff argues that the ALJ's personal opinion cannot take the place of substantial evidence.

If the ALJ relied solely on his personal opinion that Plaintiff would require one year to recuperate from surgery, the Court would agree. However, in this case, the ALJ referred to the opinions of Plaintiff's treating physicians who released Plaintiff to return to work in March of 1994. The ALJ determined that the release by Plaintiff's treating physicians and the indication by Plaintiff's treating physicians that Plaintiff could return to work indicated "medical improvement." Plaintiff's treating physician, on March 23, 1994, indicated that Plaintiff could return to work on March 17, 1994. Plaintiff was restricted to no frequent carrying of over 35 pounds, and only occasional stooping and bending. [R. at 194, 195]. In addition, Dr. Detwiler, when Plaintiff returned to him complaining of pain (May 1995), indicated that Plaintiff should undergo vocational evaluation and subsequent retraining for a job that requires less lifting and more sedentary activity. [R. at 285-86].

The ALJ determined that Plaintiff's medical improvement was evidenced by the treating physicians release in March of 1994. The ALJ additionally commented that usually surgery takes at least one year from which to recover. The ALJ additionally noted that Plaintiff's medical record indicates that Plaintiff sought medical treatment infrequently after that date. The ALJ therefore concluded that as of August 18, 1994, Plaintiff was no longer disabled. Substantial evidence supports that ALJ's decision that Plaintiff attained medical improvement following his surgery. The evidence from Plaintiff's treating physicians indicates Plaintiff was improved by the end of March of 1994. The Court interprets the ALJ's grant to Plaintiff until August of 1994 and subsequent gift to Plaintiff of additional recuperation time as not constituting reversible error.

EVALUATION OF PLAINTIFF'S CREDIBILITY

Plaintiff additionally asserts that the ALJ erred in evaluating Plaintiff's credibility. Plaintiff notes that the ALJ relied on perceived inconsistencies in Plaintiff's testimony, but that those inconsistencies were explainable. Plaintiff additionally notes that the ALJ indicated Plaintiff went for more than one year without seeking medical treatment for his back but states that this is not true. Plaintiff states that if some of the factors supporting the ALJ's credibility determination are not fully supported by the record, the court must remand to the ALJ.

In discounting Plaintiff's complaints of pain, the ALJ initially noted a lack of objective findings by Plaintiff's treating and examining physicians, a lack of medication for severe pain, the frequency of treatments sought by Plaintiff, and Plaintiff's lack of

discomfort at the hearing. [R. at 18]. Plaintiff does not discuss any of these reasons given by the ALJ. The ALJ wrote that "more specifically,": (1) Plaintiff's changing testimony concerning how long he could sit; (2) his lack of pain medication for severe pain; (3) Plaintiff went one year and one month without treatment for his back problems; (4) the January 1996 record contains no complaint regarding Plaintiff's alleged neck pain; (5) the April and May 1995 objective tests do not support Plaintiff's complaints of pain; (6) Plaintiff went from May 1995 until January 1996 before he sought treatment for spasms and he was treated for hemorrhoids; (7) no medical evidence indicates Plaintiff sought treatment for neck pain; and (8) Plaintiff's treating physicians released Plaintiff to return to work.

Plaintiff takes issue with two of the ALJ's reasons. Plaintiff states that the ALJ is incorrect in stating that Plaintiff went one year and one month without treatment for his back problems. Plaintiff refers to visits by Plaintiff in October 1994, January 1995, and April 1995. Defendant notes that although Plaintiff visited Dr. Detwiler and expressed that he had back pain, Defendant was not treated for his back pain and Dr. Detwiler indicated Defendant should be released from his care. Although Defendant may be technically correct that Plaintiff was not "treated" for pain by Dr. Detwiler, Plaintiff did seek treatment. Regardless, the court discounts this reason.

Plaintiff additionally refers to the references in the record to the length of time which Plaintiff can sit and states Plaintiff can sit longer if Plaintiff is permitted to shift. Plaintiff reads Plaintiff's testimony correctly.

The Court concludes, however, after reviewing all of the reasons referred to by the ALJ with regard to Plaintiff's credibility, the record, and the briefs of the parties, that the ALJ's credibility findings are supported by substantial evidence even if the reasons referenced by Plaintiff are discounted. The Court concludes that the decision of the Commissioner should be affirmed.

Accordingly, the Commissioner's decision is **AFFIRMED**.

Dated this 5 day of November 1998.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY L. DAVIS, et al,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

Case NO. 98-CV-312-H(J)

STIPULATION OF DISMISSAL WITH PREJUDICE

The plaintiffs, Gary L. Davis and Robert Cowan, and the Defendant, United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through PETER BERNHARDT Assistant United States Attorney, hereby stipulate to, and request entry by the Court of, the Order submitted herewith dismissing all such claims with prejudice, the parties to bear their own costs and attorneys' fees.

DATED THIS 5th day of November, 1998.

(20)

JEFF NIX OBA #6688
Nix & Scroggs
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UNITED STATES OF AMERICA

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHRISTY DUNCAN,

Plaintiff,

vs.

KENNETH S. APFEL
Commissioner, Social Security Administration,

Defendant.

Case No. 96-CV-782-C

ORDER

The judgment entered for the defendant by this Court on December 29, 1997 is hereby vacated. The Clerk of the Court is directed to remand this case to the Social Security Administration for further proceedings in accordance with the directives of the Tenth Circuit Court of Appeals, in its Order and Judgment filed on August 26, 1998.

IT IS SO ORDERED this 5th day of November, 1998.

H. DALE COOK
Senior United States District

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GARY LEE BODIFORD,

Plaintiff,

v.

GROVE GENERAL HOSPITAL, INTEGRIS HEALTH CARE CORPORATION, DEE RENSHAW, DOUG A. OHLSTROM, M.D., DARRELL R. MEASE, M.D., ROBERT L. SWEETEN, M.D., TOM R. CROSBY, M.D. and RONALD FORRISTAL, M.D.

Defendants

Case No. 98 CV 0072C (J)

ORDER OF DISMISSAL

The Plaintiff has filed an Application for Order of Dismissal and has indicated the defendants do not object to the application. Therefore, pursuant to Rule 41 (a) (2) of the Federal Rules of Civil Procedure, the Court sustains the Application for Order of Dismissal.

IT IS THEREFORE ORDERED that the Application for Order of Dismissal is granted and the case is dismissed without prejudice.

H. Dalé Cook
United States District Judge

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS E. WOLFE,

Petitioner,

vs.

RON WARD, Warden,
Cimmeron Correctional Facility,

Respondent.

Case No. 96-CV-840-K(J)

REPORT AND RECOMMENDATION

Now before the Court is Petitioner's *pro se* Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently imprisoned in the Cimmeron Correctional Facility, an Oklahoma State Penitentiary in McAlester, Oklahoma. Petitioner challenges the sentences he received after pleading guilty to the following offences: (1) one count of first degree rape (20 years), (2) two counts of lewd molestation of a child under sixteen (20 years each), (3) one count of rape by instrumentation (20 years), and (4) two counts of sodomy (10 years each). Petitioner's sentences all run concurrently. For the reasons discussed below, the undersigned recommends that Petitioner be appointed counsel and that an evidentiary hearing be set to address the issues identified in this Report and Recommendation.

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I. PROCEDURAL BACKGROUND

On July 6, 1993, Petitioner pled guilty in Tulsa County District Court, case CRF-93-2640, to one count of first degree rape, two counts of lewd molestation of a child under sixteen, one count of rape by instrumentation, and two counts of sodomy. Petitioner never attempted to withdraw his guilty plea and he did not perfect a direct appeal challenging his sentences. Almost three years later on June 11, 1996, Petitioner filed an Application for Post Conviction Relief ("APCR") in Tulsa County District Court. See Doc. No. 16, Exhibit "C."

Petitioner asserted the following as bases for relief in his APCR: (1) ineffective assistance of counsel, (2) violation of the double jeopardy clause, (3) the lack of a factual basis for his guilty plea, and (4) incompetency based on illiteracy. The Tulsa County district judge made the following factual findings in connection with Petitioner's APCR: (1) Petitioner was represented by counsel at his plea and sentencing; (2) at the time of Petitioner's plea, Petitioner was advised by the trial court of his right to a jury trial, his right to cross examine witnesses, and his right to testify; and (3) at the conclusion of his plea, Petitioner was advised of his right to appeal. The Tulsa County district judge then addressed and denied Petitioner's ineffective assistance claim on the merits. The judge also found that all of Petitioner's claims were waived due to Petitioner's failure to perfect a timely direct appeal. Consequently, Petitioner's APCR was denied on June 24, 1996. See Doc. No. 16, Exhibit "C."

Petitioner appealed the denial of his APCR by filing a Petition In Error with the Oklahoma Court of Criminal Appeals ("OCCA") on July 5, 1996. The OCCA affirmed

the denial of Petitioner's APCR on August 27, 1996 in case PC-96-814. See Doc. No. 16, Exhibit "B." The OCCA held that "[t]he doctrines of res judicata and waiver bar consideration in post-conviction proceedings of issues which have been, or which could have been, raised on a direct appeal." Id. at p. 4.

Petitioner filed this habeas action on September 12, 1996. In his Petition, Petitioner asserts the following as bases for relief: (1) ineffective assistance of counsel, (2) incompetency, (3) double jeopardy violations, (4) no factual basis for his guilty plea, and (5) the failure of the Tulsa County district judge to address all of the issues raised in Petitioner's APCR. See Doc. No. 1. Respondent argues that Petitioner's claims are procedurally barred. See Doc. No. 16.

II. EXHAUSTION OF STATE REMEDIES

Federal courts are prohibited from issuing writs of habeas corpus on behalf of prisoners in state custody unless and until the prisoner demonstrates either (1) that he "has exhausted the remedies available in the courts of the State," (2) that "there is an absence of available State corrective process," or (3) that "circumstances exist that render such process ineffective to protect the rights of the [prisoner]." 28 U.S.C. § 2254(b)(1)(A) and (B). A prisoner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). See also Picard v. Conner, 404 U.S. 270 (1971) (discussing § 2254's exhaustion requirement).

Section 2254's exhaustion requirement is a federalism-based limitation on a federal court's discretionary power to issue a writ of habeas corpus. The exhaustion requirement is designed to give states the initial opportunity to address and correct their own alleged violations of federal law. The exhaustion requirement is satisfied only when the prisoner seeking habeas corpus relief has "fairly presented" the facts and the legal theory (i.e., the "substance") supporting his federal claims to the state's highest court. Picard, 404 U.S. at 275-76. See also, Darr v. Burford, 339 U.S. 200 (1950); Duckworth v. Serrano, 454 U.S. 1 (1981); Rose v. Lundy, 455 U.S. 508 (1982); and Coleman v. Thompson, 501 U.S. 772 (1991).

Respondent admits that "Petitioner has exhausted all state remedies." Doc. No. 16, p. 2, ¶ 5. Thus, all of the claims raised in Petitioner's Petition for Writ of Habeas Corpus have been exhausted under § 2254(b). See also Doc. No. 7, Report and Recommendation, and Doc. No. 9, Order Adopting Report and Recommendation (finding that Petitioner's unexhausted claims be deemed exhausted under the exhaustion doctrine's "futility exception").

III. PROCEDURAL DEFAULT / PROCEDURAL BAR

If a state court applies an "independent and adequate" procedural rule to refuse to reach the merits of a constitutional claim (i.e., to procedurally bar a claim), a federal court will generally respect the state's procedural rule and also refuse to consider the constitutional claim in a petition for writ of habeas corpus. A state procedural rule is "independent" if it is separate and distinct from federal law. A state procedural rule is generally "adequate" if it is applied evenhandedly in the vast majority of cases. A

federal court may, however, consider a procedurally barred claim if the petitioner can either (1) establish cause for the procedural bar and actual prejudice as a result of the alleged violation of federal law, or (2) demonstrate that a refusal to consider the claim will result in a fundamental miscarriage of justice. See Coleman v. Thompson, 501 U.S. 722, 724 (1991); Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991); and Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991).

IV. ALL OF PETITIONER'S CLAIMS, EXCEPT HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, ARE PROCEDURALLY BARRED

Because ineffective assistance of counsel claims are viewed by the United States Supreme Court and the Court of Appeals for the Tenth Circuit as *sui generis*, the undersigned will deal in this section with all of Petitioner's claims except Petitioner's ineffective assistance of counsel claim.

The OCCA refused to reach the merits of Petitioner's claims, holding that Petitioner had waived his claims by not perfecting a timely direct appeal. The OCCA's waiver rule is an independent and adequate procedural rule. The OCCA's waiver rule is not based on the federal Constitution or any other federal law. The OCCA's waiver rule is, therefore, "independent." The OCCA consistently and even-handedly applies its waiver rule to any claims, like Petitioner's, that are raised for the first time in an application for post conviction relief. The OCCA's waiver rule is, therefore, an "adequate" procedural rule. Thus, the Court must find that Petitioner's claims are procedurally barred, and the Court must refuse to consider the merits of Petitioner's

claims unless Petitioner can establish either (1) cause for the procedural default (i.e., the failure to file a timely direct appeal) and actual prejudice, or (2) that the Court's refusal to consider Petitioner's claims will result in a fundamental miscarriage of justice.

A. CAUSE AND PREJUDICE

To establish cause for failing to file a direct appeal to the OCCA, Petitioner must establish that some objective factor external to his defense impeded his efforts to comply with the OCCA's direct appeal requirement. Murray v. Carrier, 477 U.S. 478, 488 (1986). Adequate cause includes interference by officials which makes compliance with a state's procedural rule impracticable, and constitutionally ineffective assistance of counsel in not bringing a claim. Worthen v. Kaiser, 952 F.2d 1266, 1268 (10th Cir. 1992). Petitioner must also demonstrate that he suffered actual prejudice. To show "prejudice," Petitioner must demonstrate "not merely that errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Murray v. Carrier, 477 U.S. 478, 488 (1986) . See also United States v. Frady, 456 U.S. 152, 168 (1982).

Petitioner has offered no real "cause" for his failure to file a timely direct appeal to the OCCA. The Tulsa County district judge's order, dismissing Petitioner's APCR, suggests, however, that Petitioner wanted to appeal from his guilty plea but was unable to get his trial counsel to file an appeal. Constitutionally ineffective assistance of counsel may constitute "cause" for a procedural default. Because the undersigned

ultimately recommends later in this Report and Recommendation that an evidentiary hearing be held in connection with Petitioner's substantive ineffective assistance of counsel claim, the undersigned further recommends that Petitioner be given a chance at the evidentiary hearing to put on evidence that would establish that his trial counsel was constitutionally ineffective with regard to the filing of a direct appeal (i.e., that Petitioner be given a chance to show cause an prejudice).

B. FUNDAMENTAL MISCARRIAGE OF JUSTICE

A federal court may proceed to the merits of a procedurally defaulted claim if the petitioner can establish that a failure to consider the claim would result in a fundamental miscarriage of justice. To come within this "very narrow exception," Petitioner must supplement his habeas petition with a colorable showing of factual innocence. Such a showing does not in itself entitle the petitioner to relief but instead serves as a "gateway" that then entitles Petitioner to consideration of the merits of his claims. Thus, factual innocence means that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Schlup v. Delo, 513 U.S. 298, 327 (1995). See also Demarest v. Price, 130 F.3d 922, 941-42 (10th Cir. 1997). Factual innocence requires a stronger showing than that necessary to establish prejudice. Id. at 326. Petitioner has offered nothing that would even come close to establishing a fundamental miscarriage as just defined.

IV. PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

A. No Procedural Bar

The general rules regarding review of claims procedurally barred in state court do not apply to ineffective assistance of counsel claims brought under the Sixth Amendment to the United States Constitution. According to the Tenth Circuit, the general rule of procedural default "must give way because of countervailing concerns unique to ineffective assistance claims." Bercheen v. Reynolds, 41 F.3d 1343, 1363 (10th Cir. 1994) (relying on Kimmelman v. Morrison, 477 U.S. 365 (1986)). See also English v. Cody, 146 F.3d 1257 (10th Cir. 1998); and United States v. Galloway, 56 F.3d 1239, 1242-43 (10th Cir. 1995) (*en banc*) (a § 2255 case). In Bercheen the Tenth Circuit focused on two factors which the Supreme Court has identified as unique to ineffective assistance claims - the need for a petitioner to consult with separate counsel on appeal in order to obtain a meaningful and objective assessment of trial counsel's performance; and the possible need to develop facts in support of an ineffective assistance claim. Id. at 1363-64. In English, the Tenth Circuit held that a state's procedural rule will not be "adequate" as to ineffective assistance of counsel claims unless the state's procedural rule accounts for these two unique factors. English, 146 F.3d at 1261-63.

The OCCA routinely refuses to hear all claims brought for the first time in an APCR, including ineffective assistance claims. The OCCA, interpreting the specific

language of Oklahoma's post-conviction relief statute, 22 Okla. Stat. § 1086,[1/] holds that any claim which could have been raised on direct appeal, but was not, is waived. The OCCA applied this precise waiver rule to Petitioner's ineffective assistance of counsel claim. The question is, therefore, whether the OCCA's waiver rule is "adequate" as it is applied to ineffective assistance of counsel claims. See, e.g., English, 146 F.3d at 1257-58.

The Tenth Circuit addressed the specific waiver rule applied by the OCCA to Petitioner's ineffective assistance of counsel claim in Bercheen and English. In Bercheen, the Tenth Circuit held that the OCCA's waiver rule is an "independent" procedural rule because it is not dependent in any way on federal law. In English, the Tenth Circuit held that if trial counsel and appellate counsel are the same, the OCCA's waiver rule can never be "adequate" as to ineffective assistance of counsel claims. English, 146 F.3d at 1264. If trial and appellate counsel differ, the OCCA's waiver rule will be "adequate" if "the ineffectiveness claim can be resolved upon the trial record alone." Id. The Tenth Circuit refused, however, to decide whether the OCCA's waiver rule would be "adequate" if trial and appellate counsel differed but resolution

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[1/] Section 1086 provides as follows:

> All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

22 Okla. Stat. § 1086.

of the ineffectiveness claim required development of facts not in the trial record. Rather, the Tenth Circuit remanded so that the trial court could determine whether the OCCA's procedural rules would permit a supplementation of the record or additional fact-finding at the direct appeal stage. Id. at 1264-65.

Kimmelman, Bercheen and English all stress the need for a petitioner to consult with separate counsel before filing a direct appeal in order to obtain a meaningful and objective assessment of trial counsel's performance. The undersigned finds, therefore, that there must be some evidence that Petitioner consulted with counsel, other than trial counsel, prior to the time for filing a direct appeal. Petitioner alleges that his trial counsel was ineffective. In fact, Petitioner alleges that his trial counsel coerced him into pleading guilty. There is no evidence in the record before the Court that prior to the time in which he was required to file a direct appeal, Petitioner had input from separate counsel sufficient for Petitioner to obtain a meaningful and objective assessment of his trial counsel's performance. The first requirement for an adequate procedural rule under Kimmelman, Bercheen and English is not met in this case. Thus, the undersigned finds that the OCCA's waiver rule is not entitled to deference and that the Court must consider Petitioner's ineffective assistance of counsel claim on the merits.

Petitioner alleges that he is virtually illiterate and that he has the mental acuity of a 6-8 year old. According to Petitioner, he was not mentally competent to sign a guilty plea or to assist in his defense. Petitioner also alleges that there was insufficient evidence to convict him on the charges to which he pled guilty, and that he only pled

guilty as a result of undue coercion from his trial counsel. Viewing these allegations together, Petitioner alleges that his trial counsel was ineffective when he advised Petitioner to pled guilty.

There is no trial record in this case because Petitioner pled guilty. Petitioner's ineffectiveness claim necessarily requires the development of facts not in the trial record. Thus, the second requirement of Kimmelman, Bercheen and English will not be satisfied unless the Court determines that, given the facts of this case, the OCCA's procedural rules would have permitted a supplementation of the record or additional fact-finding at the direct appeal stage. Because the undersigned has determined that the first requirement of Kimmelman, Bercheen and English has not been met, the undersigned will not address the OCCA's ability to develop additional facts at the direct appeal stage.[2/]

B. No Decision On The Merits From The OCCA

Respondent argues that this Court must review the OCCA's decision regarding Petitioner's ineffective assistance of counsel claim using the standards of review set forth in 28 U.S.C. § 2254(d). Section 2254(d) states as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court

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[2/] Later in this Report and Recommendation, the undersigned recommends that the Court hold an evidentiary hearing on Petitioner's ineffectiveness claim. Because the Court will be conducting an evidentiary hearing anyway, the undersigned recommends further that Respondent be given, if it so desires, the opportunity to present evidence at the evidentiary hearing that the Kimmelman factors are met in this case (i.e., that there was in fact intervening counsel between the trial and direct appeal stages and that the OCCA has procedures which would permit it to adequately develop the factual record underlying an ineffectiveness claim such as Petitioner's).

> shall not be granted with respect to any claim **that was adjudicated on the merits** in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (emphasis added).

Respondent argues that the OCCA "affirmed the [Tulsa County] district court's decision that Petitioner had failed to meet his burden of establishing ineffectiveness." Doc. No. 17, pp. 8-9. Respondent also argues that the OCCA "affirmed the district court's finding that Petitioner's trial counsel acted as reasonably competent counsel." Id. Respondent misreads the OCCA's opinion.

The OCCA begins its opinion with a short recitation of the relevant procedural history of Petitioner's case. The OCCA then lists the issues raised in Petitioner's APCR and those issues addressed by the trial court. The OCCA then summarizes the trial court's rulings, including the trial court's ruling on Petitioner's ineffectiveness claim. However, the OCCA expresses no opinion regarding the correctness of the trial court's decision on the merits. Rather, the OCCA finds that all of Petitioner's claims, including his ineffectiveness claim, are waived because they were not asserted in a direct appeal and because Petitioner presented no reason for failing to raise his claims in a timely direct appeal. Doc. No. 17, Exhibit "B," p. 4. The OCCA clearly decided

Petitioner's ineffectiveness claim on a procedural ground, not on the merits. Thus, the standards of review in § 2254(d) do not apply in this case.

C. AN EVIDENTIARY HEARING IS NEEDED

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. A federal court reviewing an ineffective assistance of counsel claim will begin by presuming that counsel's representation was within that wide range of reasonable, professional assistance that can be considered sound trial strategy. A federal court will also review counsel's performance from counsel's perspective at the time the representation was rendered, and not through the distorting lens of hindsight. Bercheen, 41 F.3d at 1365.

To prevail on a claim of actual[3/] ineffective assistance of counsel under the Sixth Amendment, Petitioner must first overcome the presumption of constitutionally adequate representation and show that his counsel committed a serious error in light of prevailing professional norms. Petitioner must conclusively demonstrate that counsel's representation fell below an objective standard of reasonableness and so undermined the proper functioning of the adversarial process that the result reached in the trial court cannot be relied on as just. If Petitioner establishes that his counsel's performance was constitutionally ineffective, he must then demonstrate that there is

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3/ Actual ineffective assistance of counsel is to be distinguished from presumed ineffective assistance. Presumed ineffective assistance exists when counsel has an actual conflict of interest and when there is a total absence of counsel during a critical stage of the proceedings. See United States v. Cronic, 466 U.S. 648, 659 n.25 (1984); and Holloway v. Arkansas, 435 U.S. 475, 484 (1978). Petitioner makes no allegations sufficient to raise a presumption of ineffective assistance by his counsel.

a reasonable probability that the outcome in the trial court would have been different had counsel performed effectively. Bercheen v. Reynolds, 41 F.3d 1343, 1365 (10th Cir. 1994) (citing Strickland v. Washington, 466 U.S. 668 (1984) and several other United States Supreme Court cases).

Petitioner alleges that he is virtually illiterate and that he has the mental acuity of a 6-8 year old. According to Petitioner, he was not mentally competent to sign a guilty plea or to assist in his defense. Petitioner alleges further than his counsel was aware of Petitioner's literacy and competency problems. Petitioner also alleges that there was insufficient evidence to convict him on the charges to which he pled guilty, and that he only pled guilty as a result of undue coercion from his trial counsel. If Petitioner can prove these allegations, then he will have established that his trial counsel's conduct fell below an objective standard of reasonableness and so undermined the proper functioning of the adversarial process that the result reached in the trial court cannot be relied on as just. If Petitioner's allegations are true, there is also a reasonable probability that the outcome in the trial court would have been different had Petitioner's counsel performed effectively (i.e., Petitioner would not have pled guilty and he would have proceeded to trial). Thus, if Petitioner can prove his allegations with admissible evidence, he will have established that his trial counsel's assistance was constitutionally ineffective.

All of the conduct of which Petitioner complains occurred outside the presence of the trial court and prior to the entry of his guilty plea. There is, therefore, no evidentiary record which the Court can review to evaluate Petitioner's ineffectiveness

claim. When the Tulsa County district judge decided Petitioner's APCR, he found that no evidentiary hearing was necessary because the application did not "present any genuine issue of material fact . . . ." Doc. No. 1, Exhibit "A," p. 1. Thus, Petitioner has never had an opportunity to develop the facts underlying his allegations of ineffective assistance of trial counsel.[4/]

Pursuant to Rule 8(a) of the Rules Governing Section 2254 Cases in the United States District Courts ("Section 2254 Rules"), the undersigned recommends that the Court hold an evidentiary hearing to permit Petitioner an opportunity to develop the facts underlying his ineffective assistance of counsel claim.[5/] The undersigned further recommends that the Court appoint the United States Federal Public Defenders Office to represent Petitioner at the evidentiary hearing. See Section 2254 Rules, Rule 8(c).

RECOMMENDATION

The undersigned recommends that counsel be appointed for Petitioner and that an evidentiary hearing be held to resolve Petitioner's Petition for Writ of Habeas Corpus. The undersigned recommends that the following issues be addressed at the evidentiary hearing: (1) cause for Petitioner's failure to file a timely direct appeal to the OCCA and the resulting prejudice, (2) whether the Kimmelman factors can be satisfied

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[4/] Because Petitioner never had an opportunity to develop a factual predicate for his ineffectiveness claim, § 2254(e)(2)'s limitations do not apply in this case.

[5/] The undersigned notes that if the Court adopts this Report and Recommendation, that the Court may, pursuant to Rule 8(b) of the Section 2254 Rules, choose to re-refer this case to the undersigned to ensure that counsel is appointed and to conduct the evidentiary hearing.

given the facts of this case as to Petitioner's ineffective assistance of counsel claim, and (3) the merits of Petitioner's ineffective assistance of counsel claim.

OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1); Section 2254 Rules, Rules 8 and 10; and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 4 day of November 1998.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 6 Day of November, 1998.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAMUEL JAY WILDER,

Plaintiff,

vs.

HONORABLE TERRY C. KERN,
HONORABLE MICHAEL BURRAGE,
HONORABLE THOMAS THORNBRUGH,
and HONORABLE RONALD SHAFFER,

Defendants.

Case No. 98-C-822-C

ORDER

Currently pending before the Court is plaintiff, Samuel Wilder's, motion to commence and maintain this action in forma pauperis, pursuant to 28 U.S.C. § 1915(a).

On October 21, 1998, Wilder filed a pro se civil rights complaint pursuant to 42 U.S.C. § 1983 against defendants. In his complaint, as well as his summons directed to the various defendants, Wilder states that this action is being brought against defendants Kern and Burrage as "U.S. District Judges for the Northern District of Oklahoma," and defendants Thornbrugh and Shaffer as "Tulsa County District Judges." Wilder alleges that "said-named Judges, conspired to evict Tenant/Plaintiff without due process of the law, to prevent Plaintiff from completing pending litigations, and receiving mail, concerning pending Actions." Wilder further alleges that "U.S. District Judges, conspired in hampering Plaintiff's effords [sic] to litigate pending lawsuit, titled Housing Authority of the City of Tulsa vs. Samuel J. Wilder," and that "Defendant's joined ongoing conspiracy with complete knowledge of Co-Conspirators aims, and goals." As his request for relief, Wilder seeks $20 million in damages. The various defendants have not been served.

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In his affidavit supporting his motion to proceed in forma pauperis, Wilder represents that he is not presently employed and that he has no assets or funds. It would appear, from the face of the affidavit, that Wilder is indeed indigent and that he is unable to pay the costs of commencing this action. Although "leave to proceed without prepayment of fees and costs is a privilege, not a right," Treff v. Galetka, 74 F.3d 191, 197 (10th Cir. 1996), and even though the Court finds the present action frivolous for the reasons stated below, the Court will nevertheless permit Wilder's complaint to be docketed without prepayment of fees. McCone v. Holiday Inn Convention Center, 797 F.2d 853, 854 (10th Cir. 1986). That is, because the economic eligibility requirement of 28 U.S.C. § 1915(a) has been met, the motion to proceed in forma pauperis is granted. Id.

The granting of in forma pauperis status, however, does not necessarily end the Court's inquiry. "Once leave has been granted, the [Court] may . . . dismiss the complaint, even prior to service of process, if it determines the complaint to be frivolous or malicious." McCone, 797 F.2d at 854. And, the Court "may consider in the same proceeding both whether the threshold requirements of § 1915(a) have been satisfied and whether the complaint is subject to dismissal under [§ 1915(e)(2)(B)(i)]." Id. "A claim is frivolous if the factual contentions supporting the claim are 'clearly baseless,' or the claim is based on a legal theory that is 'indisputably meritless.'" Olson v. Stotts, 9 F.3d 1475, 1476 (10th Cir. 1993) (citations omitted). While the Court recognizes that the raising of an affirmative defense sua sponte, and the subsequent dismissal of the action on that basis, is generally disfavored in most cases,[1] such a course of action is nevertheless proper if the affirmative defense is obvious from the face of the complaint. See Fratus v. Deland, 49 F.3d 673, 674-75 (10th

[1] "Section 1915 dismissal on the basis of an affirmative defense which the district court raises sua sponte is reserved for those extraordinary instances when the claim's factual backdrop clearly beckons the defense." Fratus v. Deland, 49 F.3d 673, 676 (10th Cir. 1995).

Cir. 1995) (in contemplating dismissal under § 1915(e), district court may consider affirmative defenses sua sponte only when defense is obvious from face of complaint and no further factual record need be developed). See also Yellen v. Cooper, 828 F.2d 1471, 1475 (10th Cir. 1987) (quoting Henriksen v. Bentley, 644 F.2d 852, 853-54 (10th Cir. 1981)) (district court need not require service of complaint and filing of answer in cases where on the face of complaint it clearly appears that the action is frivolous).

After a careful review of Wilder's complaint,[2] the Court finds that it is obvious from the face of the complaint that a valid affirmative defense renders the present action frivolous as against all named defendants. Wilder is bringing this action against federal and state court judges for acts arising out of the performance of their respective judicial functions and duties. As noted above, Wilder names all of the defendants as either U.S. District Judges or Tulsa County District Judges, and Wilder contends that the defendant judges were acting under color of law at the time the claims alleged in the complaint arose. In support of this allegation, Wilder asserts that defendants were acting as presiding judges over other lawsuits involving Wilder. It is therefore clear from a plain reading of Wilder's complaint that it only concerns judicial activity in pending cases before the defendant judges. Hence, Wilder essentially concedes in his complaint that the present action for damages is based solely and entirely on defendants' performance of their respective duties in the course of judicial proceedings.

It is well-established, however, that federal and state judges are absolutely immune from liability in damages for actions taken while performing their judicial duties. See e.g. United States

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[2] The Court recognizes that Wilder's pro se complaint must be construed liberally. Olson, 9 F.3d at 1476.

v. McKinley, 53 F.3d 1170, 1172 (10th Cir. 1995) (federal judges absolutely immune from damages liability under federal or state law for actions taken in performance of judicial duties, and such claims must fail as a matter of law); Hunt v. Bennett, 17 F.3d 1263, 1266 (10th Cir. 1994) (state judge is absolutely immune from § 1983 liability except when judge acts in clear absence of all jurisdiction); Schepp v. Fremont County, WY., 900 F.2d 1448, 1451 (10th Cir. 1990) (state court judge absolutely immune for judicial acts, even if judge acted maliciously or in excess of authority). See also Stump v. Sparkman, 435 U.S. 349, 356-59 (1978) (scope of judge's jurisdiction must be construed broadly where the issue is the immunity of that judge and neither commission of grave procedural errors nor acts in excess of the judge's authority will deprive judge of immunity). Moreover, "absolute immunity 'defeats a suit at the outset, so long as the official's actions were within the scope of the immunity.'" Roberts v. Kling, 104 F.3d 316, 318 (10th Cir. 1997) (quoting Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976)). Since it is clear that Wilder's complaint seeks damages for acts arising solely out of defendants' performance of their respective judicial duties, defendants enjoy absolute immunity.

Although immunity is an affirmative defense which normally must be pled affirmatively, it is plain on the face of the complaint that the defense precludes a rational argument on the law and facts of Wilder's claim. Yellen, 828 F.2d at 1476. Hence, as the affirmative defense and resulting frivolousness are obvious from the face of the complaint, sua sponte dismissal is proper under § 1915(e)(2)(B)(i). Id. (citing Crisafi v. Holland, 655 F.2d 1305, 1308 (D.C.Cir. 1981) (in forma pauperis complaint is properly dismissed as frivolous prior to service of process if it is clear from the face of the complaint that the defendant is absolutely immune from suit on the claims asserted)). See also Sandles v. Schneider, 914 F.Supp. 287, 289 (E.D.Wis. 1995) (because defendants are absolutely

immune from liability for damages in a civil rights action for the performance of their duties in judicial proceedings, plaintiff's motion to proceed in forma pauperis is denied and plaintiff's action is dismissed).

Accordingly, Wilder's motion to proceed in forma pauperis, pursuant to 28 U.S.C. § 1915(a), is hereby GRANTED and the Clerk is directed to file this matter without prepayment of fees and costs; it is further ordered that this action is hereby DISMISSED as frivolous, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

IT IS SO ORDERED this 5th day of November, 1998.

H. DALE COOK
Senior United States District Judge

SPC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKLAHOMA,

Plaintiff,

vs.

LOCAL 1002 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Defendants.

Case No. 98-CV-450-E

DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a)(1)(i), Federal Rules of Civil Procedure, Plaintiff Public Service Company of Oklahoma hereby dismisses its Complaint without prejudice.

DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.

By: Michael C. Redman

Michael C. Redman, OBA No. 13340
320 South Boston, Suite 500
Tulsa, OK 74103-3725
(918) 582-1211
(918) 591-5360 (Fax)

Attorneys for Plaintiff
Public Service Company of Oklahoma

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cJ

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
NOV - 5 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

LYNDA L. SILVA,

Plaintiff,

vs.

PREMIER-W.J. JONES MARKETING GROUP, INC.,

Defendant.

Case No. 97-CV-1020B(W)

ENTERED ON DOCKET
DATE 11/6/98

STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to Fed. R. Civ. P. 41(a)(1)(ii), Plaintiff, Lynda L. Silva, and Defendant, Premier-W.J. Jones Marketing Group, Inc., hereby stipulate to the dismissal with prejudice of all claims and causes of action heretofore asserted by Plaintiff Lynda L. Silva in this cause.

Lynda L. Silva
LYNDA L. SILVA
Plaintiff

THE ROBERSON LAW OFFICE

R. Lawrence Roberson, OBA # 14076
5555 S. Peoria Avenue
Tulsa, Oklahoma 74105-6840
Telephone: 918-712-1994
Facsimile: 918-712-1995

ATTORNEY FOR PLAINTIFF

Robert V. Schnitz
ROBERT V. SCHNITZ
Fisher & Phillips LLP
4675 MacArthur Court, Suite 550
Newport Beach, CA 92660-1839
Telephone: 949-851-2424
Facsimile: 949-851-0152

- and -

Michael T. Keester
Hall, Estill
320 S. Boston, Suite 400
Tulsa OK 74103
918-594-0400

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that on the 5 day of November 1996, I mailed a copy of the foregoing document, postage prepaid, to the following:

Robert V. Schnitz
4675 MacArthur Court, Suite 550
Newport Beach, CA 92660-1839

Michael T. Keester
320 S. Boston, Suite 400
Tulsa OK 74103-3708

R. Lawrence Roberson

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV - 5 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MACK FREEMAN and DEANNA FREEMAN,

Plaintiffs,

vs.

ALLSTATE INSURANCE COMPANY, the SHERIFF OF DELAWARE COUNTY, OKLAHOMA, the CITY OF GROVE, OKLAHOMA, the CITY OF COMMERCE, OKLAHOMA, and the OKLAHOMA HIGHWAY PATROL,

Defendants.

Case No. 97-CV-865-BU (J)

ENTERED ON DOCKET
DATE NOV 06 1998

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE BY THE PLAINTIFFS AND THE CITY OF GROVE

The plaintiffs, Mack Freeman and Deanna Freeman, and the defendant, the City of Grove, advise the court of a settlement agreement between the parties and pursuant to Rule 41(a)(1)(ii), FED. R. CIV. P., jointly stipulate that the plaintiffs' action against the defendant, the City of Grove, be dismissed with prejudice, the parties to bear their respective costs, including all attorney's fees and expenses of this litigation.

Dated this 5th day of November, 1998.

R. Jack Freeman, OBA #3128
Feldman, Franden, Woodard & Farris
525 South Main, Suite 1000
Tulsa, OK 74103-4514
(918) 583-7129

Attorneys for Plaintiff

J. Douglas Mann, OBA #5663
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
Tulsa, Oklahoma 74103
(918) 585-9211

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

N.M. GOFF,
Plaintiff,

vs.

CITY OF TULSA, OKLAHOMA,
a municipal corporation,
Defendant.

97-CV-563-J

EOD 11/5/98

AMENDED

JUDGMENT FOR THE PLAINTIFF

Pursuant to the unanimous verdict of the jury, the Court hereby enters judgment for the Plaintiff in the amount of $5,001.00.

Plaintiff is also awarded pre-judgment interest on the $5,001.00, at the rate of :

(1) 9.55% from April 4, 1996 to December 31, 1996;

(2) 9.15% for January 1, 1997 to December 31, 1997; and

(3) 9.22% for January 1, 1998 to October 1, 1998.

The Plaintiff is also awarded post-judgment interest from October 1, 1998, until the Judgment is paid in full, at the rate allowed by law.

Sam A. Joyner
United States Magistrate Judge

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APPROVED AS TO FORM AND CONTENT:

Mark D. Lyons

Mark D. Lyons, OBA #5590
LYONS & CLARK
616 S. Main, Suite 201
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(918) 599-8844
ATTORNEY FOR THE PLAINTIFF

John E. Dorman, OBA # 11289
City of Tulsa
Senior Assistant City Attorney
200 Civic Center, Third Floor
Tulsa, Oklahoma 74103-3827
ATTORNEY FOR THE DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WEBCO INDUSTRIES, INC.,	)	
	)	
Plaintiff,	)	11-5-98
	)	
v.	)	**Case No. 97-CV-708 H(E)**
	)	
THERMATOOL CORP. and ALPHA INDUSTRIES, INC.,	)	FILED
	)	
Defendants.	)	NOV 4 - 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER DISMISSING CERTAIN CLAIMS

FOR GOOD CAUSE SHOWN, the Court orders the plaintiff's claims for negligence (Count V), misrepresentation (Count III) and fraud (Count VI) voluntarily dismissed without prejudice.

Done this 4TH day of November, 1998.

United States District Court Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BENEFUND, INC., and
VERNON R. TWYMAN, JR.,

Defendants.

Civil Action No.
97-CV-366-E(J)

FINAL JUDGMENT OF PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF AGAINST VERNON R. TWYMAN, JR.

This matter came before this Court upon the application of plaintiff SECURITIES AND EXCHANGE COMMISSION ("COMMISSION"), by consent of defendant VERNON R. TWYMAN, JR. ("TWYMAN"), requesting issuance of this Final Judgment of Permanent Injunction and Other Equitable Relief Against Vernon R. Twyman, Jr. ("Final Judgment") has provided this Court with a Stipulation and Consent in which, inter alia, he 1) acknowledges and admits service of the Summons and Complaint; 2) acknowledges and admits the in personam jurisdiction of this Court over him, and the subject matter jurisdiction of this Court over the claims of the COMMISSION herein; 3) waives entry of findings of fact and conclusions of law under Rule 52, Fed. Rules Civ. Proc., 28 U.S.C.A., with respect to the entry of this Final Judgment; and 4) consents, for purposes of this action only, without admitting or denying any of the allegations of the COMMISSION's Complaint, except as set forth herein, to the entry of this Final Judgment .

By consenting to the entry of this Final Judgment, TWYMAN agrees to all the permanent injunctive relief prayed for by the COMMISSION, and to the Court's setting an amount of disgorgement, subject to the proviso that the COMMISSION waives payment of any disgorgement amount, and that the Court does not order payment of any civil money penalty, based on his demonstrated penury.

This Court has in personam jurisdiction over TWYMAN and subject matter jurisdiction over the claims of the COMMISSION; no further notice or hearing is required prior to entry of this Final Judgment and

there is no just reason for delay; and it appears the Court has been fully advised of the premises for entry of this Final Judgment.

IT IS THEREFORE ORDERED:

I.

TWYMAN and his agents, servants, employees, attorneys-in-fact and all persons in active concert or participation with him who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, are permanently enjoined from violating Section 5(a) and (c) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77e(a) and (c), by making use of any means or instruments of transportation or communication in interstate commerce, or of the mails, directly or indirectly:

(a). to sell securities, in the form of common stock or any other security, through the use or medium of an offering document or otherwise, unless and until a registration statement is in effect with the COMMISSION as to such securities;

(b). to carry securities, in the form of common stock or any other security, or cause them to be carried, through the mails and in interstate commerce, by any means or instruments of transportation, for the purpose of sale or delivery after sale, unless and until a registration statement is in effect with the COMMISSION as to such securities; or

(c). to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails, to offer to sell, or to offer to buy, through the use or medium of an offering document or otherwise, securities in the form of common stock or any other security, unless a registration statement has been filed with the COMMISSION as to such securities, or while a registration statement filed with the COMMISSION as to such securities is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding of examination under Section 8 of the Securities Act [15 U.S.C. § 77h]; provided, however, that nothing in this Part I. hereof shall apply to any security or transaction which is exempt from the provisions of Section 5 of the Securities Act [15 U.S.C. § 77e].

II.

TWYMAN and his agents, servants, employees, attorneys-in-fact and all persons in active concert or participation with him who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, are permanently enjoined from violating Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] by making use of any means or instruments of transportation or communication in interstate commerce, or of the mails, in the offer or sale of securities, directly or indirectly:

(a). to employ any device, scheme, or artifice to defraud;

(b). to obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c). to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon any purchaser or prospective purchaser.

III.

TWYMAN and his agents, servants, employees, attorneys-in-fact and all persons in active concert or participation with him who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, are permanently enjoined from violating Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)], and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5], by use of any means or instrumentalities of interstate commerce or of the mails, or of any facility of any national securities exchange, directly or indirectly, in connection with the purchase or sale of any security:

(a). to employ any device, scheme or artifice to defraud;

(b). to make any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c). to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

IV.

TWYMAN and his agents, servants, employees, attorneys-in-fact and all persons in active concert or

participation with him who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, are permanently enjoined from violating Section 13(a) of the Exchange Act [15 U.S.C. §78m(a)] and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder [17 C.F.R. §§240.12b-20, 240.13a-1, 240.13a-11, and 240.13a-13] by filing, or causing to be filed, with the COMMISSION any annual, quarterly or other periodic report required to be filed with the COMMISSION, on behalf of any issuer, which: contains any untrue statement of material fact; omits to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or omits to disclose any information required to be disclosed.

V.

TWYMAN and his agents, servants, employees, attorneys-in-fact and all persons in active concert or participation with him who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, are permanently enjoined from violating Section 13(b) of the Exchange Act [15 U.S.C. § 78m(b)], and Rule 13b2-1 thereunder [17 C.F.R. 240.13b2-1], by failing, or causing the failure, to make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect the transactions and disposition of the assets of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. §78l], or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. §78o(d)].

VI.

A disgorgement judgment in favor of the COMMISSION and against TWYMAN shall be entered herein, in the amount of $277,000.00, which represents the reasonably approximated amount attributable to TWYMAN by reason of the activities alleged in the COMMISSION's Complaint. This disgorgement amount was unquantified prior to the agreement of the parties, as set out in TWYMAN's Stipulation and Consent, and was arrived at as a result of evidence and evidentiary-type materials adduced by the Commission and the compromise agreement of the parties. Based upon TWYMAN's sworn representations in his Sworn Statement of Financial Condition dated August 6, 1998 and submitted to the COMMISSION, the Commission waives collection of any portion of this disgorgement amount, contingent upon the accuracy and completeness of his Sworn Statement of Financial Condition.

VII.

Based upon TWYMAN's Sworn Statement of Financial Condition, the Court is not ordering him to pay a civil money penalty pursuant to the provisions of Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]. The Court's determination not to impose a civil penalty is contingent upon the accuracy and completeness of TWYMAN's Sworn Statement of Financial Condition. Similarly, the Court recognizes and adopts the COMMISSION's representation that it waives collection of a portion of the disgorgement amount due from TWYMAN, based upon this same sworn statement. If at any time following the entry of this Final Judgment the COMMISSION obtains information indicating that TWYMAN's representations to the COMMISSION concerning his assets, income, liabilities, or net worth were fraudulent, misleading, inaccurate or incomplete in any material respect as of the time such representations were made, the COMMISSION may, at its sole discretion and without prior notice to TWYMAN, petition this Court for an order requiring him to pay the referenced disgorgement amount, with pre- and post-judgment interest thereon, and a civil penalty. In connection with any such petition, the only issues that need be presented to the Court are whether the financial information he provided was fraudulent, misleading, inaccurate or incomplete in any material respect as of the time such representations were made, and the amount of civil penalty to be imposed. In its petition, the COMMISSION may move this Court to consider all available remedies, including, but not limited to, ordering TWYMAN to pay funds or surrender assets, directing the forfeiture of any assets, or sanctions for contempt of this Final Judgment, and the COMMISSION may also request additional discovery. TWYMAN may not, by way of defense to such petition, challenge the validity of his Stipulation and Consent or the Final Judgment, contest the allegations in the Complaint filed by the COMMISSION or the amount of disgorgement and pre- or post-judgment interest, or assert that disgorgement or payment of a civil penalty should not be ordered.

VIII.

Pusuant to Section 20(e) of the Securities Act [15 U.S.C. § 77u(e)] and Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78v(d)(2), TWYMAN is hereby barred from serving as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l], or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

IX.

TWYMAN's Stipulation and Consent, as filed herein, is incorporated in this Final Judgment with the same force and effect as if set forth here.

X.

This Court shall retain jurisdiction of this action for all purposes, including for purposes of entertaining any suitable application or motion by the parties, including: (1) any motion by the Commission for additional relief within the jurisdiction of this Court, including but not limited to the relief requested by the Commission in its Complaint, and (2) any motion by the Defendant Twyman for relief from, or modification of this Order.

XI.

This Final Judgment of Permanent Injunction and Other Equitable Relief may be served upon Defendant TWYMAN in person or by mail either by the United States Marshal, the Clerk of the Court, or any member of the staff of the Securities and Exchange Commission.

DATED and SIGNED this 4TH day of NOVEMBER, 1998.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

AGREED AS TO FORM AND SUBSTANCE:

Vernon R. Twyman, Jr.

APPROVED AS TO FORM:

Jeffrey B. Norris
801 Cherry St., 19th Flr.
Fort Worth, Texas 76102
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Attorney for the United States
Securities and Exchange Commission

APPROVED AS TO FORM:

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Tel: (918) 583-7571
Fax: (918) 663-1383
Attorney for Vernon R. Twyman, Jr.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of the Small Business Administration,	)	ENTERED ON DOCKET
Plaintiff,	)	DATE 11-5-98
v.	)	
DONALD L. DECHOW aka Donald Lorraine Dechow, Jr.; SPOUSE, IF ANY, OF DONALD L. DECHOW aka Donald Lorraine Dechow, Jr.; DIANA L. DECHOW aka Diana Lynn Richmond-Dechow; SPOUSE, IF ANY, OF DIANA L. DECHOW aka Diana Lynn Richmond-Dechow; COASTAL BANC SAVINGS ASSOCIATION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	FILED NOV 4 - 1998 Phil Lombardi, Clerk U.S. DISTRICT COURT
Defendants.	)	CIVIL ACTION NO. 98-CV-0064-H (W)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 4TH day of NOVEMBER, 1998. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; that the Defendant, Coastal Banc Savings Association now known as Coastal Banc ssb, appears not, having previously filed its Disclaimer; that the Defendants, Donald L. Dechow aka Donald Lorraine Dechow, Jr.; Diana L. Dechow aka Diana Lynn Richmond-Dechow; and Spouse, if any, of Diana L. Dechow aka Diana Lynn Richmond-Dechow, appear not, but make default.

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The Court being fully advised and having examined the court file finds that the Defendant, Donald L. Dechow aka Donald Lorraine Dechow, Jr., was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on March 11, 1998; that the Defendant, Diana L. Dechow aka Diana Lynn Richmond-Dechow, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on March 19, 1998; that the Defendant, Coastal Banc Savings Association now known as Coastal Banc ssb, executed a Waiver Of Service Of Summons on April 28, 1998.

The Court further finds that the Defendant, Spouse, if any, of Diana L. Dechow aka Diana Lynn Richmond-Dechow, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning July 22, 1998, and continuing through August 26, 1998, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, Spouse, if any, of Diana L. Dechow aka Diana Lynn Richmond-Dechow, and service cannot be made upon said Defendant by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendant. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Small Business Administration, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to

his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on February 11, 1998; that the Defendant, Coastal Banc Savings Association nka Coastal Banc ssb, filed its Disclaimer on May 15, 1998; and that the Defendants, Donald L. Dechow aka Donald Lorraine Dechow, Jr.; Diana L. Dechow aka Diana Lynn Richmond-Dechow; and Spouse, if any, of Diana L. Dechow aka Diana Lynn Richmond-Dechow, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that Defendant, Donald L. Dechow aka Donald Lorraine Dechow, Jr., executed an Affidavit on June 10, 1998, stating he was a single, unmarried person as of that date. Therefore, the Court finds that Defendant, Spouse, if any, of Donald L. Dechow aka Donald Lorraine Dechow, Jr., should be dismissed from this action as no such person exists.

The Court further finds that this is a suit based upon certain promissory notes and for foreclosure of a security agreement on certain personal property located in Tulsa County, Oklahoma, and for foreclosure of mortgages upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Three (3), Block Two (2), FIDLER SECOND ADDITION, a subdivision in Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on March 28, 1985, Donald L. Dechow and Diana L. Dechow, who were then husband and wife, executed and delivered to the United States of America,

acting through the Small Business Administration, their promissory note in the amount of $84,800.00, payable in monthly installments, with interest thereon at the rate of 4 percent per annum.

The Court further finds that as security for the payment of the above-described note, Donald L. Dechow and Diana L. Dechow, who were then husband and wife, executed and delivered to the United States of America, acting through the Small Business Administration, a mortgage dated March 28, 1985, covering the above-described property. Said mortgage was recorded on May 28, 1985, in Book 4865, Page 703, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 20, 1985, Donald L. Dechow and Diana L. Dechow executed and delivered to the United States of America, acting through the Small Business Administration, a Modification of Promissory Note increasing the loan amount from $84,800.00 to a new total of $94,000.00.

The Court further finds that as security for the payment of the above-described note, Donald L. Dechow and Diana L. Dechow, who were then husband and wife, executed and delivered to the United States of America, acting through the Small Business Administration, a mortgage dated December 20, 1985, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on December 23, 1985, in Book 4914, Page 1291, in the records of Tulsa County, Oklahoma. This mortgage was given as a supplement to mortgage dated March 28, 1985, filed with the Tulsa County Clerk in Tulsa County, State of Oklahoma, in Book 4865, Page 703, for the purpose of securing increase to Note for a total amount of $94,000.00; and to reduce the dollar amount secured by the mortgage dated March 28, 1985. The balance of the loan is secured by a separate Security Agreement dated December 20,1985 and a financing statement (UCC-1), of even date, which was recorded with the Tulsa County Clerk on the 23rd day of December 1985, filing Number 541314.

The Court further finds that on December 20, 1985, Donald L. Dechow and Diana L. Dechow executed and delivered to the United States of America, acting through the Small Business Administration, a corrected real estate mortgage covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on April 29, 1986, in Book 4938, Page 2038, in the records of Tulsa County, Oklahoma. This mortgage was given for the sole purpose of correcting a dollar amount not included in supplemental mortgage dated December 20, 1985, filed in Tulsa County, State of Oklahoma, in Book 4914, Page 1291, for the purpose of securing increase to Note for a total amount of $94,000.00; and to reduce the dollar amount secured by the mortgage dated March 28, 1985 and recorded with the Tulsa County Clerk at Book 4865, Page 703 of the Book of Mortgages to $74,000.00. The balance of the loan is secured by a separate Security Agreement dated December 20, 1985 and a financing statement (UCC-1), of even date, which was recorded with Tulsa County Clerk on the 23rd day of December 1985, filing Number 541314.

The Court further finds that Defendants, Donald L. Dechow aka Donald Lorraine Dechow, Jr. and Diana L. Dechow aka Diana Lynn Richmond-Dechow, made default under the terms of the aforesaid notes, mortgages and security agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the notes, mortgages and security agreement, after full credit for all payments made, the principal sum of $79,798.15, plus accrued interest in the amount of $4,554.64 as of April 1, 1997, plus interest accruing thereafter at the rate of 4 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $364.47 ($356.47 publication fees, $8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, Coastal Banc Savings Association nka Coastal Banc ssb, disclaims any right, title or interest in the subject property.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the real and personal property which is the subject matter of this action by virtue of 1997 ad valorem taxes in the amount of $1,304.00, plus penalties and interest. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real and personal property.

The Court further finds that Defendants, Donald L. Dechow aka Donald Lorraine Dechow, Jr.; Diana L. Dechow aka Diana Lynn Richmond-Dechow; and Spouse, if any, of Diana L. Dechow aka Diana Lynn Richmond-Dechow, are in default and therefore have no right, title or interest in the subject real and personal property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Small Business Administration, have and recover judgment in personam against Defendants, Donald L. Dechow aka Donald Lorraine Dechow, Jr. and Diana L. Dechow aka Diana Lynn Richmond-Dechow, in the principal sum of $79,798.15, plus accrued interest in the amount of $4,554.64 as of April 1, 1997, plus interest accruing thereafter at the rate of 4 percent per annum until judgment, plus interest thereafter at the current legal rate of 4.730% percent per annum until fully paid, plus the costs of this action in the amount of $364.47 ($356.47 publication fees, $8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Spouse, if any, of Donald L. Dechow aka Donald Lorraine Dechow, Jr., is dismissed from this action as no such person exists.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $1,304.00 plus penalties and interest, by virtue of 1997 ad valorem taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Donald L. Dechow aka Donald Lorraine Dechow, Jr.; Diana L. Dechow aka Diana Lynn Richmond-Dechow; Spouse, if any, of Diana L. Dechow aka Diana Lynn Richmond-Dechow; Coastal Banc Savings Association nka Coastal Banc ssb; and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real and personal property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real and personal property involved herein and apply the proceeds of the sale as follows:

First:
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma;

Third:
In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the real and personal property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real and personal property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

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United States Attorney

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Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Case No. 98-CV-0064-H (W) (Dechow)

WDB:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILL BEAMAN; LELA BEAMAN,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE ARMY CORPS OF ENGINEERS,

Defendant.

Case No. 96-CV-419-H

ADMINISTRATIVE CLOSING ORDER

The parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

The parties are ordered to notify the Court within sixty days from the file date of this order as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter at the conclusion of that sixty-day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 4TH day of November, 1998.

Sven Erik Holmes
United States District Judge

29

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

SHELL & TUBE, INC., an Oklahoma corporation

Plaintiff,

v.

DANBURY SALES, INC., a foreign corporation, YODER MACHINERY SALES, INC., a foreign corporation, and WELDON F. STUMP & CO., INC., a foreign corporation,

Defendants.

ENTERED ON DOCKET

DATE NOV - 5 1998

Case No. 98-CV-408-H

FILED

NOV 4 - 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on a motion to dismiss by each of Defendant Yoder Machinery Sales, Inc. ("Yoder") (Docket # 8), Defendant Weldon F. Stump & Co., Inc. ("Stump") (Docket # 10), and Defendant Danbury Sales, Inc. ("Danbury") (Docket # 11).

Plaintiff Shell & Tube, Inc., has brought this action, alleging fraud and breach of express warranty by the above-named Defendants arising out of the sale of a Bertsch & Company Plate Rolls ("Bertsch Plate Rolls").

I

This action involves allegedly defective Bertsch Plate Rolls sold by Defendant Danbury, a foreign corporation, to Plaintiff Shell & Tube, an Oklahoma corporation.

On or about June 1, 1997, Defendant Danbury mailed a catalogue to Plaintiff in Tulsa, Oklahoma, advertising an auction of equipment to be held on June 11, 1997. Among the items described in Danbury's auction catalogue was a Bertsch Plate Rolls. Based upon the catalogue, J.F. Slagle, President of Plaintiff Shell & Tube, planned to attend the auction in Canada.

While Mr. Slagle attended another auction held by Plant & Machinery, Inc. ("PMI"), in Illinois, he mentioned to Bill Bozart, who was also in attendance, that he was going to the

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Danbury auction in Canada to bid on the Bertsch Plate Rolls advertised by Danbury. Mr. Bozart advised Mr. Slagle not to purchase the Bertsch Plate Rolls because of an allegedly cracked housing which he reportedly observed upon personally inspecting the plate rolls. Based upon Mr. Bozart's statements, Mr. Slagle decided not to attend the Danbury auction and canceled his travel arrangements.

Subsequently, Mr. Slagle discussed the Bertsch Plate Rolls and his decision not to bid on them due to the cracked housing with Mr. Jack Introligator, one of the owners of PMI. Mr. Introligator then offered to make phone calls to investigate the condition of the plate rolls. Mr. Introligator spoke with Tom Yoder at Yoder Machinery Sales, an Ohio corporation, to inquire about the condition of the housing of the Bertsch Plate Rolls. Mr. Yoder allegedly told Mr. Introligator that the housing had been cracked but that a new housing had been purchased and installed. Mr. Introligator conveyed his findings concerning the Bertsch Plate Rolls to Mr. Slagle, and allegedly in reliance upon Mr. Yoder's reported representation that the housing of the Bertsch Plate Rolls had been replaced, Mr. Slagle decided to attend the Danbury auction for the purpose of bidding on the Bertsch Plate Rolls.

Prior to bidding on the Bertsch Plate Rolls, Mr. Slagle made a thorough personal inspection of the equipment and observed that an apparently new housing had been assembled. Based upon his visual inspection and Mr. Yoder's reported representation that the cracked housing had been replaced, Mr. Slagle successfully bid $115,000 plus a 10% buyer's premium of $11,500 for the Bertsch Plate Rolls.

Following the sale, Defendant Danbury mailed an invoice for the Bertsch Plate Rolls to Plaintiff in Oklahoma. No Canadian sales tax or "GST" tax was charged to Plaintiff, indicating that the Bertsch Plate Rolls was sold for delivery and use outside of Canada. Plaintiff wired funds from an Oklahoma bank to pay the Danbury invoice.

Plaintiff contracted with Access Machinery Movers ("Access") to dismantle and load the Bertsch Plate Rolls and other equipment for transportation. During the process of loading the main body of the Bertsch Plate Rolls, the rigging broke causing the equipment to fall, which resulted in extensive damage to the Bertsch Plate Rolls. While inspecting the Bertsch Plate Rolls and estimating repair costs, Access' insurers determined that a crack in the housing was a pre-existing condition. Plaintiff has settled its claim for damages resulting from the fall caused by Access.

Upon learning of Access' contention that the housing of the Bertsch Plate Rolls was cracked prior to its being dropped, Plaintiff contacted Mr. Bozart to examine the housing. Mr. Bozart inspected the Bertsch Plate Rolls and allegedly concluded that the then-visible crack was the same crack he had seen prior to the auction and of which he had warned Mr. Slagle.

Plaintiff alleges that Defendant Danbury and Defendant Yoder, on behalf of an alleged joint venture, misrepresented to Plaintiff that the cracked housing of the Bertsch Plate Rolls had been replaced. Plaintiff further alleges that Defendant Danbury, Defendant Yoder, and Defendant Stump acted as joint venturers with respect to the sale of the Bertsch Plate Rolls to Plaintiff such that each Defendant is liable for the misrepresentations of the other; that the misrepresentations were made knowingly or in reckless disregard for the truth; Defendant Danbury and Defendant Yoder allegedly intended for Plaintiff to rely upon the misrepresentations; and Plaintiff relied upon the misrepresentations to its detriment. Finally, Plaintiff alleges that Defendant Yoder expressly warranted to Plaintiff that the cracked housing of the Bertsch Plate Rolls had been replaced when, in fact, the housing had not been replaced as warranted, and thus, Defendant Yoder and the other purported joint venturers breached this express warranty.

II

Defendant Danbury has moved to dismiss this action against it on the grounds that this Court lacks personal jurisdiction. Each of Defendant Yoder and Defendant Stump has moved to dismiss this action on grounds both that this Court lacks personal jurisdiction and that venue is improper in Oklahoma.[1]

With regard to whether Defendants are subject to personal jurisdiction in Oklahoma:[2]

> [t]he plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.

Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1417 (10th Cir. 1988) (citations omitted). Thus, the Court must "determine whether the plaintiff's allegations, as supported by affidavits, make a prima facie showing of the minimum contacts necessary to establish jurisdiction over each defendant." Id.

"The test for exercising long-arm jurisdiction in Oklahoma is to determine first whether the exercise of jurisdiction is authorized by statute and, if so, whether such exercise of

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[1] Defendant Stump has also moved the Court to deem its motion to dismiss confessed as a matter of law (Docket # 17) because of Plaintiff's alleged failure to respond timely. However, in its response (Docket # 18), Plaintiff contends that it timely filed its response and that Defendant Stump's apparent failure to receive Plaintiff's response resulted from a mailing problem. The Court finds that Plaintiff did file a combined response to all Defendants' motions to dismiss on July 16, 1998 (Docket # 15), and such filing was within the requisite fifteen-day period. See N.D. LR 7.1.C. Therefore, Defendant Stump's motion to deem confessed its motion to dismiss is hereby denied.

[2] The Court applies the law of the forum state, in this case, Oklahoma, to determine whether it has jurisdiction over a nonresident defendant in a lawsuit based on diversity of citizenship. Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Co-op., 17 F.3d 1302, 1304 (10th Cir. 1994); see also Fed. R. Civ. P. 4(e).

jurisdiction is consistent with the constitutional requirements of due process. In Oklahoma, this two-part inquiry collapses into a single due process analysis, as the current Oklahoma long-arm statute provides that '[a] court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States.'" Id. at 1416 (citations omitted).

The Rambo court stated that:

> [j]urisdiction over corporations may be either general or specific. Jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum state is "specific jurisdiction." In contrast, when the suit does not arise from or relate to the defendant's contacts with the forum and jurisdiction is based on the defendant's presence or accumulated contacts with the forum, the court exercises "general jurisdiction."

839 F.2d at 1418 (citations omitted); Doe v. Nat'l Med. Servs., 974 F.2d 143, 145 (10th Cir. 1992) ("Specific jurisdiction may be asserted if the defendant has 'purposefully directed' its activities toward the forum state, and if the lawsuit is based upon injuries which 'arise out of' or 'relate to' the defendant's contacts with the state."). The Supreme Court has explained that:

> [j]urisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the foreign state . . . it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communication across state lines, thus obviating the need for physical presence within a state in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another state, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction.

Burger King, 471 U.S. at 476.

Three criteria guide the Court's determination of whether personal jurisdiction exists: (1) in relation to the plaintiff's claim, the defendants must have purposefully availed themselves of the privilege of conducting activities in Oklahoma, Henson v. Denckla, 357 U.S. 235, 253 (1958); (2) for specific jurisdiction, the cause of action must arise from the defendants' activities in Oklahoma; and (3) the acts or the consequences of the acts of the defendants must have a substantial enough connection with Oklahoma to make the exercise of jurisdiction reasonable, see LAK, Inc. v. Deer Creek Enters., 885 F.2d 1293, 1299 (6th Cir. 1989). Additionally, in cases

involving multiple defendants, minimum contacts must be found as to each defendant over whom the court exercises jurisdiction. Calder v. Jones, 465 U.S. 783, 790 (1984).

III

Plaintiff contends that specific personal jurisdiction over each Defendant is proper in Oklahoma since each purposefully directed its own activities, and the activities of their purported joint venture, at Plaintiff, an Oklahoma resident. Plaintiff further asserts that the present litigation results from injuries that arise out of or relate to those activities.

Specifically, Plaintiff contends that Defendant Danbury is subject to specific personal jurisdiction in Oklahoma since it mailed to Plaintiff in Tulsa, Oklahoma, an auction advertisement catalogue which included a picture and description of the Bertsch Plate Rolls that Plaintiff subsequently purchased at Danbury's auction in Canada. Plaintiff further maintains that Danbury sent to Plaintiff in Oklahoma, an invoice for the Bertsch Plate Rolls and other items purchased by Plaintiff at the auction. Plaintiff additionally maintains that Danbury sent Plaintiff bank wiring instructions on how funds from American banks should be wired to Danbury, and Plaintiff accordingly transferred funds from its Oklahoma bank to Danbury. Plaintiff also maintains that Danbury had contacts with Oklahoma in the form of numerous telephone conversations and written correspondence with Plaintiff. In contrast, Danbury argues that it is not subject to specific personal jurisdiction since neither the sale of the Bertsch Plate Rolls nor the alleged misrepresentations occurred in Oklahoma.

Based upon a review of the record, the Court finds that specific personal jurisdiction over Defendant Danbury is proper in Oklahoma. Defendant Danbury (1) mailed an advertisement to Plaintiff in Oklahoma regarding its auction; (2) sent Plaintiff an invoice in Oklahoma for the Bertsch Plate Rolls and other items purchased by Plaintiff at the aforementioned auction; (3) engaged in numerous telephone conversations and written correspondence with Plaintiff in

Oklahoma in connection with the purchase; and (4) collected funds from Plaintiff's Oklahoma bank. Based on these contacts, the Court finds that Defendant Danbury has purposefully directed its activities toward Oklahoma and this lawsuit has resulted from these activities such that personal jurisdiction in Oklahoma is reasonable. Accordingly, Defendant Danbury's motion to dismiss for lack of personal jurisdiction is hereby denied.

Plaintiff also contends that Defendant Yoder is subject to specific personal jurisdiction in Oklahoma because of an express misrepresentation concerning the condition of the Bertsch Plate Rolls allegedly made by Mr. Yoder. This alleged misrepresentation occurred at an auction of Plant & Machinery, Inc. ("PMI"), in Illinois. The sequence of events regarding the alleged misrepresentation was as follows: (1) Mr. Introligator, one of the owners of PMI, called Mr. Yoder to inquire about the condition of the Bertsch Plate Rolls; (2) Mr. Yoder allegedly indicated that the housing had been cracked but that a new housing had been purchased and installed; (3) Mr. Introligator relayed this information to Plaintiff; and (4) Plaintiff, allegedly in reliance upon this representation, traveled to the Danbury auction for the purpose of bidding on the Bertsch Plate Rolls. In contrast, Defendant Yoder contends, as does Defendant Danbury, that because Plaintiff has affirmatively pled that the alleged misconduct giving rise to this suit occurred outside of Oklahoma, specific jurisdiction over Yoder cannot be invoked.

Based upon a review of the record, the Court finds that Defendant Yoder is not subject to specific personal jurisdiction in Oklahoma. First, it is undisputed that the misrepresentation allegedly made by Mr. Yoder occurred in Illinois, and the sale of the Bertsch Plate Rolls took place in Canada. Secondly, there is no evidence in the record to support Plaintiff's allegation that all three Defendants were involved in a joint venture such that the acts of Defendant Danbury could be considered the acts of Defendant Yoder.[3] Simply stated, there is no evidence

[3] In its Petition, Plaintiff alleges a joint venture among all three Defendants, as follows:

> Yoder and Stump were joint venturers of Danbury with respect to

that Defendant Yoder "purposefully directed" any activities toward Oklahoma. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 480 n.22 (1985). Because Yoder's alleged misconduct giving rise to this suit occurred outside of Oklahoma and Defendant Danbury's conduct cannot be ascribed to Yoder, there are no facts upon which to base specific personal jurisdiction for Defendant Yoder in Oklahoma.

Finally, Plaintiff contends that Defendant Stump is subject to specific personal jurisdiction by virtue of Stump allegedly being a joint venturer with Defendant Danbury and Defendant Yoder with respect to the sale of the Bertsch Plate Rolls. Defendant Stump argues that Plaintiff has admitted, albeit by omission, that Defendant Stump did not have any contacts with Oklahoma with respect to the purchase of the Bertsch Plate Rolls, and therefore the Court may only exercise jurisdiction over Stump, if at all, under the principles of general jurisdiction. Stump further contends that its sporadic sales in Oklahoma cannot possibly satisfy the minimum contacts required for general personal jurisdiction.

Based upon a review of the record, the Court finds that Defendant Stump is not subject to specific personal jurisdiction in Oklahoma. In its Petition, Plaintiff failed to allege that Defendant Stump, itself, has had any contact whatsoever with Oklahoma. Instead, Plaintiff relies solely on its allegation that Defendant Stump was involved in a joint venture with the other Defendants, and as such, is subject to personal jurisdiction to the extent that the other Defendants' conduct may subject them to such jurisdiction. As previously noted, however, there is nothing in the record to support Plaintiff's allegation that Defendants were involved in a joint venture in connection with the sale of the Bertsch Plate Rolls. Accordingly, because Defendant

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> the matters and transaction at issue herein and are subject to in personam jurisdiction of this court by reason of the actions of their joint venturer Danbury (the "Joint Venture").

(Pl.'s Pet. ¶ 6.) However, there is nothing in the record whatsoever to support any allegation of a joint venture in this case.

Stump does not otherwise have any contacts with the forum state related to the subject matter of this action, there is no specific personal jurisdiction for Defendant Stump in Oklahoma.

The Court notes that in its response brief, Plaintiff does not argue that the Court may exercise general jurisdiction over Defendant Yoder and Defendant Stump. However, in its supplemental brief, Plaintiff appears to contend that general jurisdiction may exist. Specifically, as to Defendant Yoder, Plaintiff alleges that Yoder has sent direct solicitations to Plaintiff in Oklahoma since 1997. As to Defendant Stump, Plaintiff alleges that, in August 1998, Stump mailed Plaintiff a catalogue in Oklahoma. Plaintiff additionally maintains that Stump has stated in its responses to Plaintiff's interrogatories that it has conducted business with approximately five to ten Oklahoma organizations and/or persons within the past five years, that it has contracted for transportation and rigging work with companies and/or individuals located in Oklahoma, and that it has sent a stock list of materials to organizations within its field, some of which may be located in Oklahoma.

Based upon these contentions, the Court finds that with respect to both Defendant Yoder and Defendant Stump there is not a sufficient basis for general personal jurisdiction in Oklahoma. The above-referenced contacts with Oklahoma are simply not sufficient to obviate the need for a relationship between these contacts and the subject matter of this lawsuit. See, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-15 & n.9 (1984). Neither of these Defendants has maintained an office in Oklahoma, held any property in Oklahoma, or engaged in any activity in Oklahoma of a systematic and continuous nature. Id. at 415-16. It is clear from the record that Defendant Yoder's and Defendant Stump's respective activities in Oklahoma do not create a substantial enough connection with the forum state that they should reasonably anticipate being haled into court here. See World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980) (citing cases).

Based on the above, the motion to dismiss for lack of personal jurisdiction by each of Defendant Yoder (Docket # 8) and Defendant Stump (Docket # 10) is hereby granted. Accordingly, the Court need not reach either Defendant's argument with respect to improper venue.

As noted previously, the motion to dismiss for lack of jurisdiction by Defendant Danbury (Docket # 11) is hereby denied.

IT IS SO ORDERED.

This 4th day of November, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV - 4 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WENDY SCHAEFFER,

Plaintiff,

vs.

THE UNITED STATES JUNIOR CHAMBER OF COMMERCE and JIM VERHOEF

Case No. 98-CV-303-E(J)

ENTERED ON DOCKET
DATE NOV 05 1998

ORDER

Now on this 3rd day of November, 1998, the Court, having reviewed Plaintiff's Motion for Voluntary Dismissal without prejudice, finds that the Motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that the Plaintiff is granted leave to voluntarily dismiss her cause of action and for said cause of action to be tolled for one year.

UNITED STATES DISTRICT JUDGE

27

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HOMEWARD BOUND, INC. et al.,	)	
Plaintiffs,	)	
vs.	)	**Case No. 85-C-437-E**
THE HISSOM MEMORIAL CENTER, et al.,	)	
Defendants.	)	

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on October 6, 1998, for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees and the Stipulation of the parties.

The Court hereby awards the firm Bullock & Bullock uncontested attorney fees and expenses in the amount of $50,859.31.

IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to plaintiffs' counsel, Bullock & Bullock, for attorney fees and expenses in the amount of $50,859.31, and a judgment in the amount of $50,859.31 is hereby granted on this day.

ORDERED this 3rd day of November, 1998.

868

HONORABLE JAMES O. ELLISON
United States District Court

Louis W. Bullock
Patricia W. Bullock
BULLOCK & BULLOCK
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- and -

Frank Laski
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ATTORNEYS FOR DEFENDANTS

11/3/98

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CONTINENTAL INSURANCE COMPANY, on its own behalf and as successor-in-interest to certain liabilities of HARBOR INSURANCE COMPANY and GREENWICH INSURANCE COMPANY, Plaintiff, vs. BABCOCK & WILCOX COMPANY, et al., Defendants.	)	Case No. 97-CV-989 BU(J)
BABCOCK & WILCOX COMPANY, et al., Plaintiffs, vs. CONTINENTAL INSURANCE COMPANY, et al., Defendants.	)	Case No. 97-CV-1101-BU

FILED
NOV 4 - 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE 11/5/98

JUDGMENT

This action came on before the Court upon a stipulated order, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of plaintiff Continental Insurance Company, on its own behalf and as successor-in-interest to certain liabilities of Harbor Insurance Company and Greenwich Insurance Company, for declaratory relief in accordance with the Stipulated Order filed contemporaneously herewith. Each party to this action shall bear its own costs and attorneys' fees.

(26)

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DATED: Nov 4, 1998.

By: _____
The Honorable Michael Burrage
United States District Judge
Northern District of Oklahoma

APPROVED AS TO FORM AND CONTENT:

BARROW GADDIS GRIFFITH & GRIMM

By _____
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Attorneys for Plaintiff
CONTINENTAL INSURANCE COMPANY on its own behalf and as successor-in-interest to certain liabilities of HARBOR INSURANCE COMPANY and GREENWICH INSURANCE COMPANY

MOFFETT & ASSOCIATES, P.C.

By _____
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Attorneys for Jon A. Barton, Liquidating Trustee for Cooper Manufacturing Corporation and its affiliates

KLINE & KLINE

By _____
TIMOTHY D. KLINE, ESQ.
720 Northeast 63rd Street
Oklahoma City, Oklahoma 73105

Attorneys for Babcock & Wilcox Company and USX dba United States Steel Group

S:\WPDOC\CONT\750\PLEAD\JUDG2
abh 9/16/98

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CONTINENTAL INSURANCE COMPANY, on its own behalf and as successor-in-interest to certain liabilities of HARBOR INSURANCE COMPANY and GREENWICH INSURANCE COMPANY, Plaintiff, vs. BABCOCK & WILCOX COMPANY, et al., Defendants.	)	Case No. 97-CV-989 BU(J)
BABCOCK & WILCOX COMPANY, et al., Plaintiffs, vs. CONTINENTAL INSURANCE COMPANY, et al., Defendants.	)	Case No. 97-CV-1101-BU

ORDER OF DISMISSAL WITH PREJUDICE

Plaintiffs The Babcock & Wilcox Company and United States Steel Group, a unit of USX Corporation and defendants Continental Insurance Company, Harbor Insurance Company, Greenwich Insurance Company, CNA Insurance Company (a service mark), Continental Casualty Company, Columbia Casualty Company, American Casualty of Reading, Pennsylvania and Transcontinental Insurance Company stipulate that the above-captioned matter can be dismissed with prejudice, with each party to bear its own costs and attorneys' fees.

FOR GOOD CAUSE SHOWN IT IS ORDERED, that the above-captioned case is dismissed with prejudice, with each party to bear its own costs and attorneys' fees.

Dated: 11/4/98, 1998.

By Michael Burrage
The Honorable Michael Burrage
United States District Judge
Northern District of Oklahoma

APPROVED AS TO FORM AND CONTENT:

KLINE & KLINE

By _____

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Attorneys for Plaintiffs
The Babcock & Wilcox Company and
United States Steel Group,
a unit of USX Corporation

BARROW GADDIS GRIFFITH & GRIMM

By _____

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FAX: (918) 585-2444

Attorneys for Defendants
CONTINENTAL INSURANCE COMPANY,
HARBOR INSURANCE COMPANY,
GREENWICH INSURANCE COMPANY,
CNA INSURANCE COMPANY (a service mark),
CONTINENTAL CASUALTY COMPANY,
COLUMBIA CASUALTY COMPANY,
AMERICAN CASUALTY OF READING, PENNSYLVANIA
and TRANSCONTINENTAL INSURANCE COMPANY

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LORG&LEVITT\ 9/16/98

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

DEBORAH JOHNSTON and DIANA RUSS, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

VOLUNTEERS OF AMERICA OKLAHOMA, INC.,

Defendant.

No. 96-CV-1166K
(Consolidated with
97-CV-740 K)

ENTERED ON DOCKET
DATE 11-5-98

ORDER OF DISMISSAL WITHOUT PREJUDICE

The Court, having before it the written Joint Stipulation for Dismissal Without Prejudice signed by counsel of record, finds that based upon the agreement of the parties the Joint Stipulation for Dismissal Without Prejudice should be granted as to the following Plaintiffs only: Sheila Clark, Marvin Cooney, Brenda F. Frazier, Gary W. Gaskill, Michelle L. Gaskill, Jill Gilbert, Elizabeth Bates Lampe, Patricia J. Lane, Linda Larsen, Melissa J. Moore, Lori Neuman, Sherene Ripley, Allison L. Walker, Angelica Aguirre, Glenetta R. Banks, Cassandra Blue, Terry Hill, Lisa M. Hicks, Carolyn Tiger, Gwendolyn R. Manager, Brian K. Garrison, Suzanne Sewell, Margaret K. Williams, Lydia D. Miller, Angela C. Arps, Karlene Cunningham, Donna J. Reep, and Dawn M. Dehne, with each party to bear his, her or its own costs with regard to this Dismissal.

IT IS SO ORDERED this 4 day of November, 1998.

TERRY C. KERN
United States District Judge

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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

DEBORAH JOHNSTON and DIANA RUSS, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

VOLUNTEERS OF AMERICA OKLAHOMA, INC.,

Defendant

No. 96-CV-1166K
(Consolidated with
97-CV-740 K)

ORDER OF DISMISSAL WITHOUT PREJUDICE

The Court, having before it the written Joint Stipulation for Dismissal Without Prejudice signed by counsel of record, finds that based upon the agreement of the parties the Joint Stipulation for Dismissal Without Prejudice should be granted as to the following Plaintiffs only: Lynette Clark, Alicia Ortiz, Connie Reed, Latasha Ruff, Larry Summers, and Lisa Stucks, with each party to bear his, her or its own costs with regard to this Dismissal.

IT IS SO ORDERED this 3 day of November, 1998.

TERRY C. KERN
United States District Judge

Jo Anne Deaton

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WANDA SOUTHARD,

Plaintiff,

vs.

TOWER MARKETING, INC.,

Defendant.

Case No. 97-CV-778K(M)

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed. R. Civ. P. 41(a)(1)(ii), Plaintiff Wanda Southard and Defendant Tower Marketing, Inc. hereby stipulate to the dismissal with prejudice of all claims and causes of action heretofore asserted by Plaintiff Wanda Southard in this cause.

WANDA SOUTHARD
Plaintiff

THE ROBERSON LAW OFFICE

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- and -

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ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TRI-STATE INSURANCE COMPANY,

Plaintiff,

vs

RICHARD E. MARTIN d/b/a REM-TRK,

Defendant.

Case No. 97-CV-1116B (E)

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to the Stipulation of the parties, it is hereby ORDERED that all the claims of the Plaintiff, Tri-State Insurance Company, and all the counter-claims of the Defendant, Richard E. Martin d/b/a REM-TRK, are hereby ORDERED dismissed with prejudice to refiling.

IT IS SO ORDERED.

JUDGE OF THE DISTRICT COURT
for Thomas R. Brett, Judge

Approved:

WILBURN, MASTERSON & SMILING

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04550099/ls

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES C. and JILL M. HUMPHREYS,

Plaintiffs,

v.

JOHNYNE FUSELIER, individually, JAMES ARTHUR SPARGUR, individually, JAMES ARTHUR SPARGUR d/b/a SPECIALITY BUILDERS, RICK OVERTURF, individually, BRET D. BARNHART, individually and d/b/a BRET D. BARNHART CONSTRUCTION COMPANY, an Oklahoma corporation and BRYAN McCART, individually,

Defendants.

Case No. 96-CV-942-H E

ORDER OF DISMISSAL WITH PREJUDICE AGAINST DEFENDANTS BRET D. BARNHART, INDIVIDUALLY, AND D/B/A BRET D. BARNHART CONSTRUCTION COMPANY, INC.

NOW on this 2nd day of November 1998, this matter comes on before the Court on Plaintiffs' Motion to Dismiss their claims against the Defendants, Bret D. Barnhart, individually, and d/b/a Bret D. Barnhart Construction Company, Inc. The Court finds that Plaintiffs and Defendants, Bret D. Barnhart, individually, and d/b/a Bret D. Barnhart Construction Company, Inc., have entered into a settlement and that there are no other cross-claims or counterclaims involving said Defendants, and therefore, the Plaintiffs' Motion to Dismiss claims against Defendants, Bret D. Barnhart, individually, and d/b/a Bret D. Barnhart Construction Company, Inc., should be and same is hereby sustained.

(24)

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion to Dismiss claims against Defendants, Bret D. Barnhart, individually, and d/b/a Bret D. Barnhart Construction Company, Inc., with prejudice should be and same is hereby sustained, and that all parties hereto shall bear their own costs and attorney fees in regard to this action.

JUDGE OF THE U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JIM MAUK,

Petitioner,

vs.

GLEN BOOHER, Warden,

Respondent.

No. ~~98-CV~~-831-E (E)

ORDER OF TRANSFER

Petitioner, a state prisoner appearing pro se, has filed a motion for leave to proceed in forma pauperis and an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons discussed below, this Court lacks jurisdiction over the petition and the Court concludes this action should be transferred to the United States District Court for the Western District of Oklahoma.

A prisoner in custody pursuant to the judgment and sentence of a State court which has two or more Federal judicial districts may file a petition for writ of habeas corpus in either the district court for the district wherein such person is in custody or in the district court for the district within which the conviction was entered. 28 U.S.C. § 2241(d). Each of such district courts shall have concurrent jurisdiction over the petition and the district court wherein the petition is filed may, in the exercise of its discretion and in furtherance of justice, transfer the petition to the other district court for hearing and determination. Id.

In this case, Petitioner is incarcerated at John H. Lilley Correctional Center, Boley, Okfuskee County, Oklahoma, located within the jurisdictional territory of the Eastern District of Oklahoma. 28 U.S.C. § 116(a). Petitioner challenges his convictions entered in Kay County District Court,

(2)

which is located within the territorial jurisdiction of the Western District of Oklahoma. 28 U.S.C. § 116(c). Based on 28 U.S.C. § 2241(d), this Court lacks jurisdiction. Therefore, because the most convenient forum for judicial review of the issues raised in this petition would be the Western District of Oklahoma where any necessary records and witnesses would most likely be available, the Court concludes that, in the furtherance of justice, this matter should be transferred to the United States District Court for the Western District of Oklahoma.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's application for a writ of habeas corpus and Petitioner's motion for leave to proceed in forma pauperis are **transferred** to the United States District Court for the Western District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d).

IT IS SO ORDERED this 2d day of November, 1998.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDMOND L. QUALLS, **SSN: 492-56-5710,**	)	
Plaintiff,	)	
v.	)	**Case No. 97-CV-0209-EA**
KENNETH S. APFEL, **Commissioner of Social Security,**[1]	)	
Defendant.	)	

ORDER

Claimant, Edmond L. Qualls, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.[2] In accordance with 28

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[1] Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

[2] On April 9, 1992, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.), and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's applications for benefits were denied in their entirety initially (June 24, 1992), and on reconsideration (September 24, 1992). A hearing before Administrative Law Judge Stephen C. Calvarese (ALJ) was held March 31, 1993, in Tulsa, Oklahoma. By decision dated May 17, 1993, the ALJ found that claimant was not disabled at any time through the date of the decision. On October 21, 1993, the Appeals Council denied review of the ALJ's findings. Claimant filed an action for review in this District, and on February 1, 1995, the case was remanded for an additional consultative examination and supplemental hearing. The case was remanded by the Appeals Council to the ALJ, and a supplemental hearing was held on September 10, 1996. By decision dated October 4, 1996, the ALJ found that claimant was not disabled on or before December 31, 1995 (the date claimant was last insured for disability benefits under Title II). On January 14, 1997, the Appeals Council declined to assume jurisdiction. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.984(b)(2), 416.1484(b)(2).

U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals.

Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. CLAIMANT'S BACKGROUND

Claimant was born on March 30, 1949, and lives in Tulsa, Oklahoma. He has a seventh grade education, and is not able to read or write. Claimant was 47 years old at the time of the supplemental administrative hearing. He has not been engaged in substantial gainful activity since 1990. Claimant's past relevant work is as a parts puller (dismantling cars), concrete worker, iron worker, rebar worker, carpenter, and ditch digger. (R. 499) He alleges disability due to back pain, hand pain, headaches, numbness in legs, severe hand fungus, limited mobility, and illiteracy. (R. 501-04)

II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

Disability under the Social Security Act is defined as the "...inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment...." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of

substantial gainful work in the national economy...." Id., § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.[3]

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991).

One of the issues now before the Court is whether there is substantial evidence in the record to support the final decision of the Commissioner that claimant was not disabled within the meaning of the Social Security Act. The term substantial evidence has been interpreted by the U.S. Supreme Court to require "...more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The search for adequate evidence does not allow the court to substitute its discretion for that of the agency. Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981). Nevertheless, the court must review the record as a whole,

---

[3] Step One requires the claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510. Step Two requires that the claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with certain impairments listed in Appendix 1 of Subpart P, Part 404, 20 C.F.R. Claimants suffering from a listed impairment or impairments "medically equivalent" to a listed impairment are determined to be disabled without further inquiry. If not, the evaluation proceeds to Step Four, where the claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If the claimant's Step Four burden is met, the burden shifts to the Commissioner to establish at Step Five that work exists in significant numbers in the national economy which the claimant--taking into account his age, education, work experience, and RFC--can perform. See Diaz v. Secretary of Health & Human Servs., 898 F.2d 774 (10th Cir. 1990). Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

and "the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant could not perform his past relevant work, but he retained the residual functional capacity (RFC) to perform exertional and nonexertional requirements of unskilled, repetitive sedentary and light work, subject to limited left-hand fine finger manipulation, limited sense of touch, and limited ability to manipulate small objects. (R. 441) The ALJ concluded that there were other jobs existing in significant numbers in the national and regional economies that claimant could perform, based on his RFC, age, education, and work experience. Having concluded that there were a significant number of jobs which claimant could perform, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

IV. MEDICAL HISTORY

Claimant's medical history prior to remand relative to back pain and mental impairments was summarized in the Magistrate Judge's 1994 Report and Recommendation:

> The evidence is summarized as follows: On March 17, 1980, Mr. Qualls was admitted to Central Kansas Medical Center in Great Bend, Kansas, with acute lumbosacral strain and spondylolisthesis. He was discharged March 23, 1980. On February 25, 1982, the same facility admitted Qualls and he underwent spinal fusion at the L4-S and S1 levels. The hospital discharged him March 4, 1982.
>
> On July 14, 1986, Mr. Qualls was admitted to a Dallas, Texas hospital after he complained of lower back pain from a [sic] April 20, 1986 work injury. Doctors diagnosed him with lumbar radicular syndrome. On July 17, 1986, Dr. Sydney Bonnick, M.D., found that Mr. Qualls could return to work with the following limitations: carrying 17 pounds, pushing/pulling 20 pounds and sitting and standing five minutes before changing his position. *Record at 210.* Mr. Qualls was

hospitalized in November of 1986 for lower back and intermittent leg pain. He underwent a fusion from L-4 to S-1, which was done without complications.

On April 21, 1992, Dr. Richard Felmlee examined Mr. Qualls. Dr. Felmlee diagnosed him with low back pain, bilateral sciatica, muscle strain and left ear occlusion. Dr. Felmlee noted that Mr. Qualls could not make a fist without assistance from his left hand due to his amputated finger. *Id. at 167-170.* Dr. Felmlee examined Mr. Qualls three other times in May of 1992 for continued complaints of low back pain. He diagnosed Mr. Qualls with chronic lumbar pain and prescribed medication.

Dr. James M. Lee, a Ph.D., conducted a psychological evaluation on Mr. Mr. [sic] Qualls September 8, 1992. The WAIS-R indicated he had a verbal I.Q. of 75, a performance I.Q. of 88 and a full scale I.Q. of 81, which was within the "low dull normal range." Dr. Lee said that Mr. Qualls appeared to have the ability to understand, retain and follow simple instructions, although he had a below average attention span. Dr. Lee also added that he suspected Mr. Qualls' ability to relate to other workers was below average because his stress tolerance and frustration level were low. In addition, Dr. Lee opined that Mr. Qualls' overall reasoning skills appeared to be impaired.

(R. 450-51) The Magistrate Judge recommended that the ALJ's failure to discuss claimant's hand impairments required remand. (R. 454)

The District Court, in its Judgment of remand, found that substantial evidence supported the finding of not disabled due to back pain and/or mental impairments. Therefore, the question on remand was whether claimant's hand impairments, alone or in combination with other impairments, render claimant disabled. (R. 458, n. 1)

V. REVIEW

Claimant asserts as error that the ALJ, upon remand:

- failed to perform a proper RFC assessment;
- failed to perform a proper credibility analysis; and
- failed to pose proper questions to the vocational expert.

RFC Assessment

Claimant alleges that the ALJ's findings concerning his RFC are not supported by substantial evidence. The specific error alleged is that there is no evidence in the record supporting the finding that claimant can perform light work, particularly in light of his hand problems and pain. Plaintiff's Memorandum Brief, Docket #11, at 3.

On remand, claimant was examined by Emil Milo, M.D., an orthopedic specialist. (R. 474-87) Dr. Milo reported a limited range of motion in claimant's lumbar area. Claimant complained of mid-thoracic pain, rather than lumbar pain, without any radiation. Claimant had normal reflexes and normal muscle strength. Straight leg raising was negative. (R. 474) Dr. Milo found no postural limitations, and no exertional limitations. (R. 476-77, 479-80) Dr. Milo examined claimant for hand limitations. Dr. Milo found:

> [H]e has a full range of motion in all fingers of his right hand except in the distal phalanx joint which is decreased by 60°. Regarding his left hand this is decreased in his index, middle and ring finger as a result of the injuries and what appears transection of the extensor tendons on the level of the DIP joints. He does have fungal nails in most of the fingers. His [sic] is able to touch his thumb to the tips of the other fingers as well as grasp larger objects. As far as manipulation with his fingers he is inadequate. He is not wearing shoe laces on his sneakers.

(R. 474)

Relying on Dr. Milo's opinion, as well as those of intervening treating physicians, the ALJ determined that claimant's hand impairments, either alone or in combination with other impairments, did not render claimant disabled. (R. 438-39) The ALJ determined that claimant retained the RFC for light and sedentary work. Light work is defined as involving lifting no more than twenty pounds, with frequent lifting of objects weighing up to ten pounds. 20 C.F.R. §§ 404.1567(b), 416.967(b). A job is categorized as light work if it requires a good deal of standing or walking, or sitting most of

the time with some pushing and pulling of arm or leg controls. Id. A finding of RFC for light work includes a finding of RFC for sedentary work, with certain limitations. Id. The ALJ specifically found that claimant had an RFC for a full range of sedentary or light work, with certain limitations relating to his hands:

> The medical evidence with respect to the claimant's hands is consistent. Dr. Felmlee wrote that the claimant had a somewhat functional left hand and a reduced grip in both hands. Dr. Milo's medical records show the specific restrictions on the claimant's ability to use his hands. The restrictions allow the claimant to oppose the thumbs to the finger tips and grasp a tool such as a hammer, but the claimant was unable to manipulate small objects.
>
> Dr. Felmlee's medical evidence is given full weight because it is consistent with the remainder of the medical evidence and he has treated the claimant over a long time. Dr. Milo's medical report is given full weight, but not as great as Dr. Felmlee's, because he is not a treating physician. Dr. Milo's medical report is not inconsistent with Dr. Felmlee's medical evidence, Dr. Milo's medical report supplements Dr. Felmlee's medical evidence by showing the specific findings and limitations with respect to the claimant's ability to use his hands. Dr. Felmlee's medical evidence shows that the claimant can use his arms and legs, despite his complaint of thoracic spine pain, there was no radiation of the pain and there was no showing of any exertional limitations. The claimant is limited to light work because of the limitations imposed by his hands which have been set out above not considering his mental status which is considered below.

(R. 438-39)

The ALJ's determination is supported by substantial evidence. The ALJ performed a detailed analysis of the medical evidence received subsequent to his prior decision. (R. 436-37) The opinions of Dr. Felmlee and Dr. Denton, treating physicians, and Dr. Milo, consultative examiner, were accurately summarized. (Compare id. with R. 466-75) The medical evidence supports a finding of the limitations found by the ALJ: limited left-hand fine finger manipulation, limited sense of touch, and limited ability to manipulate small objects. (R. 473, 474) Consistent with the medical evidence, the ALJ's RFC assessment includes a finding that none of claimant's impairments prevent him from

lifting up to ten pounds (sedentary), or ten pounds frequently with twenty pound maximum (light). Claimant himself testified that he can lift a gallon of milk (R. 509), and Dr. Milo found that claimant can effectively grasp tools such as a hammer. (R. 475) Claimant asserts that he cannot perform the exertional requirements of light or sedentary work because of pain. Plaintiff's Memorandum Brief, Docket #11, at 3. Dr. Milo found no functional limitations imposed on claimant, such as restrictions on sitting, standing, lifting or reaching, caused by pain. (R. 475-76) Dr. Milo and the ALJ found it noteworthy that claimant is prescribed no pain medication. (R. 476-77, 436, 438, 492) There is substantial evidence in the record to support the ALJ's RFC assessment.

Credibility Analysis

Claimant contends that the ALJ's credibility analysis (R. 437-40) does not comply with Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995), because it fails to link credibility findings with specific medical evidence. Kepler requires express findings on credibility of claimant's complaints of disabling pain, with an explanation of why specific evidence relevant to each factor led to the conclusion that the subjective complaints were not credible. Id. at 391.

Claimant complains of back and hand pain. (R. 501) In his earlier opinion, the ALJ performed a detailed analysis, linked to specific evidence, of the factors listed in 20 C.F.R. §§ 404.1529(c)(3) and 416.929(c)(3). (R. 15-16) In his more recent opinion, the ALJ recited the pain analysis factors and proceeded to his conclusion, without linking the evidence by factor. (R. 437-38) This omission does not require remand, however, because the record must be viewed in its entirety, the evidence on which the ALJ relied earlier is part of the record and supports the ALJ's conclusion, and the ALJ's conclusion as to credibility did not change. (Compare R. 16 with R. 437-38) Further, the ALJ gave reasons for his conclusion, even though not specifically linked factor by factor:

> After such due considerations, I find that the claimant's allegations are not fully credible because, but not limited to, the objective findings, or the lack thereof, by treating and examining physicians, the lack of medication for severe pain, the frequency of treatments by physicians and the lack of discomfort shown by the claimant at the hearing.
>
> Even more specifically, the claimant's testimony is not credible because he does not take any pain relievers; he did not seek medical treatment for more than 2 years, June 1992 to November 1994 and from 1986 to 1992, despite the fact that free medical care is and was available; there are no significant and continuing complaints of pain in the head; he continued to work through 1990; and the claimant has been convicted of a felony.

(R. 437-38) Although the ALJ's credibility analysis should have linked the evidence relied on to each factor, the Kepler requirement was met by the ALJ giving his reasons for his conclusion. Kepler, 68 F.3d at 391. The credibility finding is supported by substantial evidence and the correct legal standards were applied.

Questions to the Vocational Expert

Claimant alleges that the ALJ erred by asking the vocational expert to assume, inter alia, that claimant could perform light or sedentary work. (R. 527-30) The hypothetical questions are alleged to be flawed because the witness is asked to assume that claimant can work.

A hypothetical question cannot assume its own answer, such as "Assuming the claimant can perform light or sedentary work, are there any jobs he can do?" See Simonson v. Schweiker, 699 F.2d 426, 430 (8th Cir. 1983). However, the ALJ's hypothetical questions were not so general. For example, the ALJ asked:

> Assuming an individual is 47 years of age, male. Has the seventh grade education. Is basically illiterate and can only do poor math, I'd say just adding and subtracting, I believe, no multiplication or division. Let's say this person has the past work history you just described and let's assume the person can perform say sedentary or light work with these additional restrictions. Use Exhibit 40 which is the most recent of what we have, pages 6 through 9, I believe. Okay. There are no exertional

> limitations, but there are some hand restrictions. Reaching is, let's see, unlimited. Handling is unlimited. Fingering is limited. Feeling is limited. Fine finger manipulation is limited with the left hand as a result of injury to the extension tendons of the index finger and ring fingers. Also feeling is limited due to keratropic changes in the skin. I believe those are the only restrictions. With those restrictions, are there any jobs in the regional and national economies such a person can perform?

(R. 527) A hypothetical question is not erroneous where some evidence in the record supports an assumption. Hardaway v. Secretary of Health & Human Servs., 823 F.2d 922, 927-28 (6th Cir. 1987). When an ALJ uses a category name (e.g., sedentary) merely to posit the assumption that claimant can perform the exertional requirements of sedentary work, in lieu of reciting "can lift no more than ten pounds," and then adds other nonexertional limitations and work restrictions, the question is not improper if otherwise supported by the record. Id. at 927; see, e.g., Hunt v. Chater, Case No. 96-5085, 1996 WL 731596, **2 (10th Cir. Dec. 20, 1996); McGough v. Shalala, Case No. 92-7073, 1993 WL 503118, **2 (10th Cir. Dec. 8, 1993). As discussed above, the ALJ's assumption of claimant's ability to perform the exertional requirements of light or sedentary work is supported by the record. Therefore, the questions posed to the vocational expert are not improper. See Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993).

VI. CONCLUSION

The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

DATED this 3rd day of November, 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EDMOND L. QUALLS,
SSN: 492-56-5710,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security,

Defendant.

Case No. 97-CV-0209-EA

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 3rd day of November 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOYCE GUIDE for
ZANDY L. CRAWFORD, a minor,
SS# 440-82-8439

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

Case No. 97-CV-947-J

JUDGMENT

This action has come before the Court for consideration and an Order reversing the Commissioner's denial of benefits and remanding the case to the Commissioner for further proceedings has been entered. Consequently, Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 2 day of November 1998.

Sam A. Joyner
United States Magistrate Judge

(12)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOYCE GUIDE for
ZANDY L. CRAWFORD, a minor,
SS# 440-82-8439

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,

Defendant.

Case No. 97-CV-947-J

ORDER[1/]

Plaintiff, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of Administrative Law Judge, Richard J. Kallsnick, denying Children's Social Security benefits. Plaintiff asserts that the Commissioner erred because Plaintiff meets Listing 112.11 for Attention Deficit Hyperactivity Disorder. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision for further proceedings consistent with this Order.

I. DISCUSSION

The statutes and regulations in effect at the time of the ALJ's decision required application of a four-step evaluation process. See 42 U.S.C. § 1382c(a)(3)(A)(1994) and 20 C.F.R. § 416.924(b)(1994).

[1/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

(11)

After the ALJ's decision, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 ("the Act"). The Act amended the substantive standards for the evaluation of children's disability claims. The statute currently reads:

> An individual under the age of 18 shall be considered disabled for the purpose of this subchapter if that individual had a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. § 1382c(a)(3)(C)(i). The notes following the Act provide that this new standard for the evaluation of children's disability claims is to be applied to all cases which have not been finally adjudicated as of August 22, 1996 (i.e., the effective date of the Act). This includes cases in which a request for judicial review is pending. Consequently, § 1382c's new standard applies in this case. See Gertrude Brown for Khilarney Wallace v. Callahan, 120 F.3d 1133 (10th Cir. 1997).

The regulations which implement the Act provide:

> An impairment(s) causes marked and severe functional limitations if it meets or medically equals in severity the set of criteria for an impairment listed in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, or if it is functionally equal in severity to a listed impairment.
>
> (1) Therefore, if you have an impairment(s) that is listed in appendix 1, or is medically equal in severity to a listed impairment, and that meets the duration requirement, we will find you disabled.

> (2) If your impairment(s) does not meet the duration requirement, or does not meet, medically equal, or functionally equal in severity a listed impairment, we will find that you are not disabled.

20 C.F.R. § 416.924. Consequently, based on the applicable statutes and regulations, Plaintiff is disabled only if Plaintiff can establish that Zandy meets one of the Listings in 20 C.F.R. Pt. 404, Subpt. P, App. 1. See Brown, 120 F.3d at 1135.

The problem created in this case is a result of the intervening change in the law. Due to the new statutes, children are considered disabled only if their impairments or combination of impairments meet or equal a Listing. Because the applicable law at the time of the ALJ's decision was different, the ALJ did not discuss the Listings in any detail.

When addressing a Listing, an ALJ must discuss the evidence in detail and explain in detail why the claimant does not meet the elements of the relevant Listing. Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996). In this case, the ALJ merely stated that based on a review of the evidence, the claimant did not meet a Listing. This type of analysis is exactly the type of analysis that was criticized by the Tenth Circuit in Clifton. In Clifton the ALJ did not discuss the evidence or his reasons for determining that the claimant's impairments did not meet a Listing. The ALJ merely stated his summary conclusion that the claimant's impairments did not meet or equal any listed impairment. As in Clifton, the ALJ in this case did not discuss the medical evidence in connection with his Listing conclusion. In Clifton, the Tenth Circuit held that this

type of a bare conclusion was beyond any meaningful judicial review. Clifton, 79 F.3d at 1009.

The Tenth Circuit identified the problem as follows:

> In the absence of ALJ findings supported by specific weighing of the evidence, we cannot assess whether relevant evidence adequately supports the ALJ's conclusion that [the claimant's] impairments did not meet or equal any Listed impairment, and whether he applied the correct legal standards to arrive at that conclusion. The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence. . . . Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects. . . . Therefore, the case must be remanded for the ALJ to set out his specific findings and his reasons for accepting or rejecting evidence at step three.

Clifton, 79 F.3d at 1009-10 (internal citations omitted).

The Court believes that the change in the applicable law during the time period between the decision of the ALJ and the decision of this Court is responsible for the situation presented in this case. However, because no specific findings were made by the ALJ regarding the applicable Listing, this Court is unable to review the ALJ's decision and determine whether or not it was supported by substantial evidence.

The Court is in no way expressing an opinion as to whether Plaintiff actually meets or equals a Listing. The Court is limited to reviewing the findings made by the ALJ and determining if those findings are supported by substantial evidence. Consequently, the Court is remanding this case to permit the ALJ an opportunity to

discuss his conclusions in connection with Listing 112.11. Only then can the Court adequately review the ALJ's decision.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this Order.

Dated this 2 day of November 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
NOV - 2 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CARLA CHAPPELL,

Plaintiff,

v.

NORTHEAST OKLAHOMA ELECTRIC COOPERATIVE, INC., an Oklahoma corporation,

Defendant.

Case No. 98-CV-0316-BU (EA)

ENTERED ON DOCKET
DATE 11/3/98

DISMISSAL WITH PREJUDICE

COMES NOW, the Plaintiffs, Carla Chappell, by and through her attorneys, the law firm of Bonds, Matthews, Bonds & Hayes, and dismisses her Petition in the above-styled and numbered case with prejudice for the reason that same has been fully compromised and settled.

Dated this 16th day of October, 1998.

Carla Chappell, Plaintiff

BONDS, MATTHEWS, BONDS & HAYES
P. O. Box 1906
Muskogee, OK 74402-1906

Attorneys for Plaintiff

By: Martha J. Cherbini

Albert R. Matthews, O.B.A. #5779
Martha J. Cherbini, O.B.A. #17535
Bonds, Matthews, Bonds & Hayes
P. O. Box 1906
Muskogee, OK 74402-1906
(918) 683-2911

(14)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDWARD E. JONES, JR.,

Plaintiff,

v.

NORTHEAST OKLAHOMA ELECTRIC COOPERATIVE, INC., an Oklahoma cooperation,

Defendant.

Court No. 98-CV -0317-BU(EA)

STIPULATION OF
DISMISSAL WITH PREJUDICE

COMES NOW, the Plaintiff, Edward R. Jones, by and through his attorneys, the law firm of Bonds, Matthews, Bonds & Hayes, and dismisses his Petition in the above-styled and numbered case with prejudice for the reason that same has been fully compromised and settled.

Dated this 16th day of October, 1998.

Edward E. Jones, Jr.
Edward E. Jones, Plaintiff

BONDS, MATTHEWS, BONDS & HAYES
P. O. Box 1906
Muskogee, OK 74402-1906

Attorneys for Plaintiff

By: Martha J. Cherbini
Albert R. Matthews, O.B.A. #5779
Martha J. Cherbini, O.B.A. #17535
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P. O. Box 1906
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(918) 683-2911

10/27/98
lc

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 2 - 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA)
Plaintiff,)
)
v.) CIVIL ACTION NO. 97CV0088 H
)
SAMUEL PARKER,)
Defendant.)

ENTERED ON DOCKET
DATE 11-3-98

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter comes on for consideration this 23rd day of October, 1998, pursuant to a regularly scheduled pretrial/status conference. The plaintiff appears by and through Assistant United States Attorney, Loretta F. Radford. The Defendant, Samuel Parker, appears not.

The Court being fully advised and having examined the court file, including the Plaintiff's Motion for Summary Judgment and the Defendant's Response to the Motion for Summary Judgment, has determined that the Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Samuel Parker, for the principal amount of $2,848.65, plus accrued interest in the amount of $1,307.93 as of November 14, 1996, at a rate of 8% per annum until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest

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thereafter at the current legal rate of 4.73 percent per annum until paid, plus costs of this action.

HONORABLE SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 2 - 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
vs.	)	No. 96 CV 1199H
	)	
NBI SERVICES, INC.	)	
	)	
Defendant.	)	

11-3-98

ORDER ADMINISTRATIVELY CLOSING CASE AND STAYING PROCEEDINGS PENDING SETTLEMENT

The Court having reviewed the Plaintiff's motion to administratively close the above styled case and stay further proceedings until December 14, 1998 and good cause having been found:

IT IS ORDERED THAT this case shall be administratively closed and all proceedings shall be stayed until December 15, 1998.

It is so ordered ~~October~~ November 2nd, 1998.

UNITED STATES DISTRICT COURT JUDGE

nbiadmin.ord(miscgen)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)
	)
RASKIN RESOURCES, INC., Plaintiff,	)
	)
ROCKWELL INTERNATIONAL COPORATION, a Delaware corporation consolidated Plaintiff	)
	)
v.	)
	)
ROCKWELL INTERNATIONAL CORPORATION, a Delaware Corporation, Defendant	)
	)
HOWARD RASKIN, PHYLLIS M. RASKIN, DEBORAH RASKIN, GREGORY A. RASKIN, ROBERT H. RASKIN, consolidated Defendant	)

Case No. 94-CV-452 – H

ORDER GRANTING STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW before the Court the Plaintiff, Raskin Resources, Inc., Debtor, and Raskin Resources, Inc., the consolidated Plaintiff and the Defendant, Rockwell International, Stipulation of Dismissal With Prejudice of any and all claims against each other, with prejudice to refiling. The parties' Stipulation of Dismissal With Prejudice is hereby GRANTED.

United States District Court Judge,
Sven Erik Holmes

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAMSON RESOURCES COMPANY,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	Case No. 94-C-934-H
	)	Judge Sven Erik Holmes
INTERNATIONAL BUSINESS PARTNERS, INC.,	)	
	)	ENTERED ON DOCKET
Defendant.	)	DATE 11-3-98

JUDGMENT UPON STIPULATION

Upon the joint motion and stipulation of both parties and for good cause shown, it is hereby ordered, adjudged, and decreed that the stay is lifted and judgment is entered in this action in favor of Samson Resources Company against International Business Partners, Inc. in the amount of $200,000 (U.S.), plus post-judgment interest. All costs and attorneys fees are to be borne by the respective parties. It is further ordered, adjudged and decreed that this is the judgment of this Court and the Clerk is hereby directed to enter the same as such.

DATED this 2ND day of ~~October~~ November, 1998.

Sven Erik Holmes
United States District Judge

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10/27/98 fe

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA)
Plaintiff,)
)
v.) CIVIL ACTION NO. 98CV0167H(J)
)
ROBERT R. SHAVER,)
Defendant.)

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter comes on for consideration this 2nd day of ~~October~~ November, 1998 upon Plaintiff's Motion for Summary Judgment. The United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, moves pursuant to Rule 56 of the Federal Rules of Civil Procedure, for Summary Judgment in its favor and against the defendant, Robert R. Shaver. The defendant, Robert R. Shaver, has not responded to Plaintiff's Motion for Summary Judgment.

The Court being fully advised and having examined the court file, has determined that the Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Robert R. Shaver, for the principal amounts of $2930.89 and $741.38, plus administrative charges in the amounts of $39.18 and $16.28, plus accrued interest in the amounts of $1,178.19 and $291.27, at the rates of 8% and 7.51% per annum until judgment,

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plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the legal rate of 4.73% until paid.

HONORABLE SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

shaver.sjo

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT MICHAEL GAFFNEY,

Plaintiff,

vs.

RONALD CHAMPION, Warden of the Dick Conner Correctional Center,

Defendant.

Case No. 96-CV-1110-B(J)

REPORT AND RECOMMENDATION

Now before the Court is Defendant's motion for summary judgment. [Doc. No. 19]. Defendant's motion has been referred to the undersigned for a report and recommendation pursuant to 28 U.S.C. § 636.

Plaintiff filed this action pursuant to 42 U.S.C. § 1983, alleging that Defendant, in his personal and official capacities, violated his constitutional rights by denying him adequate medical treatment. In his motion for summary judgment, Defendant argues that summary judgment should be granted in his favor because (1) Plaintiff's claims are barred by the statute of limitations, (2) Defendant is entitled to Eleventh Amendment immunity in his official capacity, (3) Defendant is entitled to qualified immunity in his personal capacity, (4) Plaintiff has not alleged Defendant's personal participation in any of the constitution violations as is required to state a claim under § 1983, and (5) Plaintiff cannot establish that Defendant was deliberately indifferent as is required to establish a violation of his constitutional rights. For the reasons

discussed below, the undersigned recommends that Defendant's motion for summary judgment be **GRANTED**.

I. PROCEDURAL HISTORY - PLAINTIFF'S SEARCH FOR A DEFENDANT

Plaintiff is not acting *pro se* or *in forma pauperis*. Plaintiff is acting through counsel. Plaintiff filed his original Complaint on December 3, 1996. As defendants, Plaintiff named (1) the State of Oklahoma *ex rel.* the Oklahoma Department of Corrections, (2) the State of Texas *ex rel.* the Texas Department of Criminal Justice ("TDCJ"), (3) the State of Texas *ex rel.* Wayne Scott as the Executive Director of the TDCJ,[1/] and (4) Correctional Medical Systems ("CMS") as a d/b/a of Medical Services, Inc.

On March 25, 1997, Plaintiff filed a notice of dismissal and dismissed CMS "because Plaintiff . . . learned that [CMS] was not the medical provider responsible and culpatory in this action." Doc. No. 11. On August 4, 1997, Plaintiff filed a second notice of dismissal and dismissed Wayne Scott "because Plaintiff . . . learned that [Mr. Scott] should not be charged in this matter." Doc. No. 13. Thus, the only remaining defendants were the States of Oklahoma and Texas.

Oklahoma and Texas filed motions to dismiss. [Doc. Nos. 14 and 15]. Oklahoma argued that the § 1983 claims against it should be dismissed because (1) the State was entitled to immunity from suit in federal court pursuant to the Eleventh

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[1/] In the style of his original Complaint, Plaintiff indicates that he is suing Mr. Scott in his official capacity as the Executive Director of the TDCJ. However, within the body of the Complaint, Plaintiff attempts to hold Mr. Scott liable for conduct taken in his individual capacity. See Doc. No. 1, ¶¶ V(9), VI(2), VI(4), and VI(5). In fact, Plaintiff concludes his Complaint by seeking a judgment against "Defendants in their official and individual capacity in an amount not less than $300,000.00 . . . ." Id. at ¶ VII(5).

Amendment of the United States Constitution, and (2) neither a state nor its instrumentalities are "persons" within the meaning of § 1983. [Doc. No. 14]. Texas asserted its Eleventh Amendment immunity and also attacked the sufficiency of Plaintiff's Complaint under Fed. R. Civ. P. 12(b)(6). Plaintiff failed to file response to the States' motions to dismiss.

On December 10, 1997, the Court held a status conference at which the motions to dismiss filed by Oklahoma and Texas were discussed. At the conference, Plaintiff confessed the motions to dismiss and requested leave to amend his Complaint. Leave to amend was granted, and Plaintiff was given until December 29, 1997 to file an amended complaint. See December 10, 1997 Minute. Plaintiff requested an extension of time on December 29th, which was granted. Plaintiff was given until January 8, 1998 to amend his Complaint. See Doc. No. 16 and January 5, 1998 Minute Order.

Plaintiff filed an untimely Amended Complaint on January 9, 1998. [Doc. No. 17]. As defendants, Plaintiff named (1) Ron Champion as warden of the Dick Conner Correctional Center in Oklahoma, (2) Mitchell Liles as warden of the Holiday Correctional Facility in Texas, (3) Reed Smith as warden of the Gist Correctional Facility in Texas, and (4) Larry Plentl as warden of the LeBlanc Correctional Facility in Texas. Plaintiff sued Messrs. Champion, Liles, Smith and Plentl in their official and individual capacities as wardens.

Plaintiff served Mr. Champion with a summons and a copy of the Amended Complaint on May 5, 1998. See Return of Service. The Court held a status

conference on June 4, 1998. By the date of the conference, Plaintiff had not served any of the Texas wardens named as defendants.[2/] The Court raised the service issue with Plaintiff at the status conference, and Plaintiff announced that he intended to dismiss the Texas wardens, which he later did by filing a stipulation of dismissal. See June 4, 1998 Minute and Doc. Nos. 20 and 21. Thus, the only remaining defendant is Ron Champion, warden of the Dick Conner Correctional Center ("DCCC").

Mr. Champion filed his motion for summary judgment on June 29, 1998. Pursuant to N.D. LR 7.1(C), Plaintiff's response brief was due by July 17, 1998. Plaintiff requested an extension of time on July 17, 1998, which was granted. See Doc. Nos. 22 and 23. Plaintiff was given until August 7, 1998 to file his response. Plaintiff filed an untimely response (i.e., more than a month out of time) on September 10, 1998. [Doc. No. 24]. Defendant chose not to file a reply brief.

The undersigned finds that the procedural history recited above demonstrates Plaintiff's and/or Plaintiff's counsel's disregard for the orders and rules of this Court and Plaintiff's lack of investigation regarding the proper defendants to be named in this lawsuit.

[2/] Pursuant to Fed. R. Civ. P. 4(m), Plaintiff was required to serve the defendants named in the Amended Complaint "within 120 days after the filing of the [amended] complaint . . . ." The Amended Complaint was filed on January 9, 1998. Thus, Plaintiff was required to serve the Texas Defendants by May 11, 1998.

II. PLAINTIFF'S AMENDED COMPLAINT

Following is a summary of the allegations in Plaintiff's Amended Complaint. By summarizing the allegations in the Amended Complaint, the undersigned is in no way suggesting that those allegations are undisputed or supported by any evidence currently in the record.[3/]

Plaintiff reported to the Lexington Assessment and Reception Center ("LRAC") on September 16, 1993. While at the LRAC, Plaintiff received a severe cut on one of his legs when he fell while trying to climb into an upper bunk bed. The cut eventually became severely infected.[4/] Plaintiff was transferred to the Dick Conner Correctional Center on October 8, 1993. Upon arriving at the DCCC, Plaintiff reported his cut leg to the DCCC medical staff and requested treatment. Plaintiff was ignored for a week, during which time "edema"[5/] set in and his leg swelled to 2½ times its normal size. When Plaintiff was finally seen by the DCCC medical staff on October 18, 1993, he was immediately transported to Griffin Memorial Hospital.

Plaintiff was admitted and treated at the hospital with intravenous antibiotics. Plaintiff was discharged on October 29, 1993 after a six night stay. Plaintiff was

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[3/] At this stage, the summary judgment record is sparse. The only evidence in the record is (1) an Affidavit filed by Jim Rabon, a coordinator for the Oklahoma Department of Corrections' Sentence Administration and Offender Records department, which details the dates of Plaintiff's incarceration at various correctional facilities (doc. no. 19, Exhibit "2"); (2) Plaintiff's "Consolidated Record Card" which is used by the Oklahoma Department of Corrections to track the time served by Plaintiff (doc. no. 19, Exhibit "1"); and (3) a one page affidavit by Plaintiff stating that he "did all that he could to apprise [sic] all individuals in authority of [his] need for medical attention." [Doc. No. 24, Exhibit "A"].

[4/] This allegation is different than the allegation in the original Complaint. In his original Complaint, Plaintiff alleged that he received the cut while he was incarcerated at the Tulsa County Jail.

[5/] "Edema" is defined as "[a] local or generalized condition in which the body tissues contain an excessive amount of tissue fluid." Tabor's Cyclopedic Medical Dictionary 606 (17th ed. 1993).

discharged with an oral antibiotic prescription and with a scheduled, follow-up visit. Bandage changes were recommended twice a day as was daily whirlpool therapy.

Plaintiff alleges that when he returned to the DCCC, the DCCC medical staff took his medication and refused to treat him. Plaintiff's leg worsened, and when he returned to the hospital on November 16, 1993 he was readmitted with "cellulitis venous insufficiency."[6/] Plaintiff underwent six weeks of intravenous antibiotic therapy and two surgeries. Plaintiff was released on December 23, 1993 with adequate venous supply to his leg. Upon his return to the DCCC, Plaintiff was again refused treatment and his leg became "necrotic"[7/] and he lost feeling in his leg. On February 24, 1995, Plaintiff was paroled from the DCCC to the custody of Texas to begin serving sentences on Texas charges.[8/]

Plaintiff alleges that he now has persistent, long-term pain in his leg. Plaintiff also alleges that he has had a 30% loss of muscle in his leg. Plaintiff alleges further that he can no longer walk, run or exercise as he once did.

[6/] "Cellulitis" is described as follows: "Inflamation of cellular or connective tissue . . . . An infection in or close to the skin is usually localized by the body defense mechanisms. However, if inflamation spreads through the tissue, the process is called cellulitis." Tabor's Cyclopedic Medical Dictionary 342 (17th ed. 1993).

[7/] "Necrotic" is a reference to the process of "necrosis." "Necrosis" is described as follows: "Death of areas of tissue or bone surrounded by healthy parts . . . . The term is usually applied to . . . small areas of tissue, while gangrene is generally appliec to destruction of specific parts or larger areas." Tabor's Cyclopedic Medical Dictionary 1280 and 1281 (17th ed. 1993).

[8/] There are no medical records in the summary judgment record which would substantiate any of Plaintiff's allegations.

III. UNDISPUTED FACTS

Based on the record currently before the Court, the undersigned finds that only the following facts are undisputed:

1. Plaintiff was transferred to the DCCC on October 8, 1993;

2. Plaintiff was paroled from the DCCC on February 24,1995; and

3. From October 8, 1993 to the present, Defendant, Ronald Champion has been the warden at the DCCC.

IV. DISCUSSION

A. PLAINTIFF'S OFFICIAL CAPACITY CLAIMS

Plaintiff has attempted to assert claims against Defendant in his official capacity as warden of DCCC. The DCCC is a correctional facility operated by the Oklahoma Department of Corrections, which is an agency of the State of Oklahoma. An official capacity suit is simply another way of pleading an action against an entity of which the officer is an agent. An official capacity suit is in all respects, other than name, to be treated as a suit against the governmental entity. Kentucky v. Graham, 473 U.S. 159 (1985); Polk County v. Dodson, 454 U.S. 312 (1981). Thus, Plaintiff's official capacity claims are in reality claims against the State of Oklahoma.

1. Eleventh Amendment Immunity

The Eleventh Amendment to the United States Constitution prohibits a State's own citizens and citizens of other states from suing the State in federal court. Plaintiff is an Oklahoma citizen. Doc. No. 17, p. 3. Plaintiff may not, therefore, sue the State of Oklahoma in this federal court. See Eastwood v. Dep't of Corrections of State of

Okla., 846 F.2d 627 (10th Cir. 1988) (specifically holding that the Eleventh Amended bars suits against the Oklahoma Department of Corrections in federal court).

2. Persons Under 42 U.S.C. § 1983

Section 1983 provides as follows:

> Every **person** who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (emphasis added).

A State is not a "person" as that term is used in § 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 64 (1989). While § 1983 does provide "a federal forum to remedy many deprivations of civil liberties, . . . it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." Id. at 66. Thus, Plaintiff cannot state a § 1983 claim against the State of Oklahoma.

In light of the clearly applicable Supreme Court precedent discussed above, Plaintiff's and his counsel's assertion of an official capacity claim against Defendant was not "warranted by existing law," and Plaintiff has asserted no argument "for the extension, modification, or reversal of existing law or the establishment of new law."

See Fed. R. Civ. P. 11(b)(2). Plaintiff's official capacity claims were, therefore, patently frivolous.

B. PLAINTIFF'S PERSONAL CAPACITY CLAIMS

Plaintiff has asserted claims against Defendant in his personal capacity. That is, Plaintiff seeks a money judgment against Defendant personally. If such a judgment were rendered, it would be paid out of Defendant's own pocket, and not from any State funds.

1. Statute of Limitations

a. *The Applicable Statute of Limitations - 42 U.S.C. § 1988*

Congress did not provide a statute of limitations for civil rights claims under § 1983. However, in 42 U.S.C. § 1988 Congress directed the courts to follow a three-step process to determine the limitations period applicable to civil rights claims.

> First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal rights statutes] into effect." If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum state. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States."

Burnett v. Grattan, 468 U.S. 42, 47-48 (1984) (citations omitted) (quoting 42 U.S.C. § 1988).

Applying the first step of § 1988's analysis, the Supreme Court determined in Burnett that there is no federal law which provides an appropriate limitations period

for § 1983 claims. See Burnett, 468 U.S. at 49. In Burnett and other cases, the Supreme Court had directed courts to apply the second step of § 1988's analysis by selecting the "most analogous" and "most appropriate" statute of limitations from the forum state. However, in Wilson v. Garcia, 471 U.S. 261 (1985), "the Supreme Court abandoned that uncertain and confusing practice in favor of a simple, bright-line rule." Blake v. Dickason, 997 F.2d 749, 750 (10th Cir. 1993). In Garcia, the Supreme Court found that "§ 1983 claims are best characterized as personal injury actions," and held that the forum state's personal injury statute of limitations should be applied to all §1983 claims. Garcia, 471 U.S. at 280. In Owens v. Okure, 488 U.S. 235 (1989), the Supreme Court refined the Wilson rule by holding that when the forum state has multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow "the general or residual statute for personal injury actions" and not the limitations period for specific intentional torts. Owens, 488 U.S. at 249-50.

Oklahoma has multiple personal injury statutes of limitations. See, e.g., 12 Okla. Stat. §§ 95(3), 95(4) and 95(6). In Oklahoma, the residual statute of limitations for personal injury actions is § 95(3) and it provides a two-year limitations period. Frederick v. State of Oklahoma, No. 94-6275, 1994 WL 673048, *1 (10th Cir. Nov. 30, 1994). Thus, as long as the third step of § 1988's analysis is satisfied, Plaintiff's § 1983 claims will be subject to § 95(3)'s two year statute of limitations.

Under the third step of § 1988's analysis, the undersigned finds that Oklahoma's two-year residual statute of limitations for personal injury actions comports with all relevant federal interests. The Supreme Court has identified the two

principal policies underlying § 1983 as the "compensation of persons injured by deprivation of federal rights and [the] prevention of abuses of power by those acting under color of state law." Robertson v. Wegmann, 436 U.S. 584, 591 (1978); Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980). The Supreme Court has also articulated a strong federal interest in having clear, predictable, and easily applied standards for selecting civil rights statutes of limitations. See Owens, 488 U.S. at 235; and Wilson, 471 U.S. at 261. Thus, § 1988's "federal interest" test is applied to the selection of a limitations period generally, and not to the specific injury alleged in a civil rights complaint. Blake, 997 F.2d at 751. Plaintiff offers no reason why Oklahoma's two-year statute of limitations is insufficient to accommodate § 1983's compensation and deterrence goals.[9/]

b. *Application of the Applicable Statute – 12 Okla. Stat. § 95(3)*

The last day upon which Plaintiff could have been injured at the DCCC was February 24, 1995 – the date he was paroled to Texas custody. Thus, the two year statute of limitations for constitutional violations allegedly suffered at the DCCC would have expired on February 24, 1997. Defendant was not named as a defendant in this case until January 9, 1998, almost a year after the statute of limitations had run.

[9/] See McDougal v. County of Imperial, 942 F.2d 668, 673 (9th Cir.1991) (finding one-year statute of limitations sufficient to protect federal interests); Jones v. Preuit & Mauldin, 876 F.2d 1480, 1484 (11th Cir.1989) (same). See also Arnold v. Duchesne County, 810 F. Supp. 1239, 1244-45 (D. Utah 1993) (finding Utah's two-year statute of limitations consistent with federal interests of compensation and deterrence). Cf. Burnett, 468 U.S. at 61 (Rehnquist, J., concurring in the judgment) ("The willingness of Congress to impose a 1-year limitations period in 42 U.S.C. § 1986 demonstrates that at least a 1-year period is reasonable.").

Consequently, Defendant argues that Plaintiff's § 1983 claim is barred by Oklahoma's two year statute of limitations. Absent, a doctrine that would allow Plaintiff's Amended Complaint to relate back to the filing of his original Complaint, the undersigned agrees with Defendant that Plaintiff's claims are time barred.

Plaintiff argues that Fed. R. Civ. P. 15(c) permits his Amended Complaint to relate back to the filing of his original Complaint. Rule 15(c) provides as follows:

> An amendment of a pleading relates back to the date of the original pleading when
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment
>
> (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and
>
> (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed. R. Civ. P. 15(c)(2) and (3).

Plaintiff's counsel's entire argument regarding the application of Rule 15(c) consists of the following sentence: "Rule 15(c) allows for the correction of a misnomer or mis-description of a defendant which will relate back to the original filing of the

petition." Doc. No. 24, p. 2. Plaintiff's counsel does not refer to a specific subsection of Rule 15(c). Other than referring to the rule, Plaintiff's counsel offers the Court no authority as to how Rule 15(c)(3) should be applied given the facts of this case. Plaintiff's counsel simply invites the Court to conduct Plaintiff's legal research for him.

A plain reading of Rule 15(c)(3) reveals at least five elements which must be established before an amended complaint that adds a party will relate back to the date the original complaint was filed. First, the claim asserted in the amended complaint must arise out of the "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." See Fed. R. Civ. P. 15(c)(2). Second, the Plaintiff must have made a "mistake concerning the identity of the proper party." See Fed. R. Civ. P. 15(c)(3)(B). Third, within 120 days of the filing of the original complaint, the newly added defendant (1) must have received notice of the plaintiff's claim sufficient to prevent prejudice to the new defendant's ability to maintain a defense, and (2) must become aware that, but for the mistake concerning the identity of the proper party, plaintiff would have sued the newly added defendant. See Fed. R. Civ. P. 15(c)(3)(A) and (B). Plaintiff's counsel offers no argument to demonstrate that these elements have been met in this case.

The first element of Rule 15(c)(3) is established. The claims asserted in Plaintiff's original and amended complaints are nearly identical. Thus, the claim asserted in the Amended Complaint does arise out of the conduct, transaction, and occurrence set forth in Plaintiff's original Complaint.

There is no evidence demonstrating that the second element of Rule 15(c)(3) has been established. The advisory committee notes to Rule 15(c)(3) demonstrate that the rule is meant to allow an amendment changing the name of a party to relate back to the original complaint only if the change is necessitated by a mistake in the original complaint, such as a misnomer or misidentification of a party. There is nothing in the record which demonstrates that Plaintiff's failure to name Ronald Champion in the original Complaint should be characterized as either a factual or a legal mistake.

Plaintiff's original Complaint named as defendants an institution and an individual (e.g., Texas Department of Criminal Justice and Wayne Scott), and Plaintiff sought damages against the individual in his official and personal capacities. Plaintiff was, therefore, aware that he had to name as a defendant an individual warden or corrections officer in order to maintain a cause of action for personal liability against the warden or officer. Plaintiff's failure to specifically name Ronald Champion, when he specifically named Wayne Scott, appears to be a matter of choice rather than a mistake as to the technicalities of constitutional tort law. See, e.g., Barrow v. Wethersfield Police Dept., 66 F.3d 466, 469-70, as modified by 74 F.3d 1366 (2nd Cir. 1996).

There is also no evidence that Plaintiff was unaware that Ronald Champion was the correct party. Plaintiff was incarcerated at the DCCC for almost 17 months. Plaintiff alleges that most of the unconstitutional treatment he received occurred at the DCCC. Ronald Champion was the warden of the DCCC during Plaintiff's incarceration there. Plaintiff has no excuse for failing to learn the identity of the DCCC warden

before filing his original Compliant. Rule 15(c)(3)'s mistake element is not meant to compensate a Plaintiff for his lack of investigation or diligence. Id.

There is also no evidence that the third element of Rule 15(c)(3) has been met in this case. There is no evidence that Ronald Champion received the notice required by Rule 15(c)(3). The rule requires that Mr. Champion receive notice that Plaintiff was asserting a personal liability claim against him by April 2, 1997 (i.e., within 120 days of the date the original Complaint was filed).

Plaintiff argues that Mr. Champion had adequate notice because Plaintiff named Plaintiff's employer, the Oklahoma Department of Corrections ("ODOC"), in the original Complaint. Plaintiff filed his original Complaint on December 3, 1996. However, Plaintiff did not serve the ODOC until September 22, 1997. See Return of Service in File. Thus, even if service on the ODOC could constitute notice to Mr. Champion, Plaintiff did not serve the ODOC by April 2, 1997 as required by Rule 4(m) and 15(c)(3). Rather, Plaintiff served the ODOC five months later.

Even if the original Complaint had been timely served on the ODOC, the undersigned finds that service on the ODOC would not have sufficiently notified Mr. Champion that Plaintiff was seeking to hold Mr. Champion personally liable. The original Complaint never mentions the DCCC or Mr. Champion. In fact, the original Complaint alleges that Plaintiff was injured at the Tulsa County Jail, which is not a part of the Oklahoma Department of Corrections. Plaintiff's original Complaint simply makes general allegations about his treatment while in the Oklahoma prison system. The undersigned finds that service of the original Complaint on the ODOC did not

provide Mr. Champion with sufficient notice that Plaintiff was asserting a personal liability clam against him.

Plaintiff has failed to establish that the elements of Rule 15(c)(3) have been met in this case. Plaintiff's Amended Complaint will, therefore, not relate back to the date his original Complaint was filed. Consequently, Plaintiff's personal liability claims against Mr. Champion are barred by the two statute of limitations in 12 Okla. Stat. § 95(3).

2. No Evidence of Defendant's Personal Participation

The failure to provide adequate medical care to a prisoner is a violation of the Eighth Amendment's prohibition of cruel and unusual punishment. To establish such a violation, the prisoner must demonstrate that the prison officials were deliberately indifferent to the prisoner's serious illness or injury. Estelle v. Gamble, 429 U.S. 97 (1976). To successfully assert a § 1983 claim for an Eighth Amendment violation, Plaintiff must show Defendant's personal involvement or participation in the alleged denial of medical care. Defendant's supervisor status alone is insufficient to support liability; there is no *respondeat superior* liability under § 1983. A supervisor is not liable under § 1983 for the actions of a subordinate unless an "affirmative link" exists between the constitutional deprivation and either the supervisor's personal participation or his failure to supervise. Grimsley v. MacKay, 93 F.3d 676, 679 (10th Cir. 1996); Mitchell v. Maynard, 80 F.3d 1433, 1441 (10th Cir. 1996).

Following is the only allegation in Plaintiff's Amended Complaint regarding Mr. Champion's involvement in the alleged denial of medical care to Plaintiff:

> In particular, Defendant, Ronald Champion of the Department of Corrections had a non-discharagble [sic] duty under state law 22 O.S. § 1154 to provide medical care to the Plaintiff, and he [sic] relies upon Oklahoma statute, ordinance, regulations and the eighth, fourteenth, and fifth amendments within the meaning of Title 42 U.S.C. § 1983 which have rendered Defendants liable for actual damages to Plaintiff for violation of his statutory rights and Constitution from date of incarceration.

Doc. No. 17, ¶ VI(3).[10/] This allegation does not sufficiently establish the type of "affirmative link" required to create liability under § 1983.

When a summary judgment motion is filed,

> the movant bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. In so doing, a movant that will not bear the burden of persuasion at trial need not negate the nonmovant's claim. Such a movant may make its prima facie demonstration simply by pointing out to the court a lack of evidence for the nonmovant on an essential element of the nonmovant's claim. If the movant carries this initial burden, the nonmovant that would bear the burden of persuasion at trial

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[10/] Section 1514 is titled "Purposes and policies of the criminal justice and corrections systems." The relevant portion of § 1514 provides as follows:

> It is the mission of the Department [of Corrections] to provide housing, clothing, food and **medical care** to its inmates, to maintain a safe and secure prison system, to keep accurate records, to offer job training, education, counseling, work and treatment programs deemed appropriate to monitor and advance the rehabilitative progress of its inmates, to provide a fair and orderly progression through custody levels, and to make data and recommendations regarding parole available to the Pardon and Parole Board.

22 Okla. Stat. § 1154(6) (emphasis added). This is a mission statement not, as the Plaintiff argues, the establishment of a duty which cannot in any way be delegated. Plaintiff's citation to § 1154 is, therefore, misleading at best.

> may not simply rest upon its pleadings; the burden shifts to the nonmovant to go beyond the pleadings and "set forth specific facts" that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant. To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein.

Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 671 (10th Cir. 1998) (internal citations omitted).

Plaintiff, and not the Defendant, has the burden in this case of proving an affirmative link between the constitutional violation alleged by Plaintiff and Defendant's conduct. To carry his burden, Defendant need only demonstrate the absence of any evidence in the record that would establish an affirmative link. The undersigned finds that Defendant has done so in this case. Thus, to survive summary judgment Plaintiff must go beyond his pleadings and set forth specific facts, supported by references to affidavits, depositions or exhibits. The evidence establishing these specific facts must be admissible at trial and it must be sufficient to permit a rational trier of fact to find an affirmative link between the constitutional violation alleged by Plaintiff and Defendant's conduct. Plaintiff has wholly failed to carry this burden. Plaintiff points to no facts which would establish the affirmative link necessary to establish liability against Defendant under § 1983.

RECOMMENDATION

Plaintiff's official capacity claims against Defendant are barred by the Eleventh Amendment. Plaintiff's official capacity claims are also not cognizable under 42 U.S.C. § 1983 because the State of Oklahoma is not a "person" as that term is used

in § 1983. Plaintiff's personal liability claims against Defendant are barred by the applicable statute of limitations, 12 Okla. Stat. § 95(3). Plaintiff has also failed to carry his summary judgment burden with regard to his personal liability claims. Consequently, the undersigned recommends that Defendant's motion for summary judgment be **GRANTED.** [Doc. No. 19].

OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 30 day of October 1998.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 3 Day of November, 1998.

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

NORMAN CLARK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 97-C-1093-C
	)	
B.H. INDUSTRIES,	)	
HANDICAPPED INDUSTRIES,	)	
	)	
Defendants.	)	

PLAINTIFF'S DISMISSAL OF ACTION WITH PREJUDICE

COMES NOW, Norman Clark, and hereby dismisses his action in the above styled matter with prejudice against the named Defendants.

Respectfully submitted,

NORMAN CLARK
901 N. Elgin #809
Tulsa, OK 74126

CERTIFICATE OF MAILING

This is to certify that on this 23 day of October, 1998 the foregoing pleading was mailed with postage prepaid, via Certified Mail, Return Receipt Requested, to the following named Defendant:

C. Craig Cole, OBA# 1775
Lorrie A. Corbin, OBA# 16403
C. CRAIG COLE & ASSOCIATES
317 Northwest Twelfth Street
Oklahoma City, Oklahoma 73103

Norman Clark

mail
cld

C. CRAIG COLE & ASSOCIATES
Attorneys and Counselors at Law
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C. CRAIG COLE
LORRIE A. CORBIN
JULIANA K. REIMER
J.D. IRCINK
LARRY NOEL MILLER
HEIDI L. WOMMER

FILE NUMBER

815.001

Attorney-Client Privilege Claimed
Work-Product Privilege Claimed
Self-Critical Examination Privilege Claimed

October 27, 1998

Phil Lombardi
U.S. District Court for the
Northern District of Oklahoma
Clerk of the Court
333 West Fourth Street, Room 4-411
Tulsa, Oklahoma 74103-3819

RE: Norman Clark v. B.H. Industries, et al., United States District Court for the Northern District of Oklahoma, Case No. 97C-1093-C

Dear Clerk:

Enclosed please find for filing the following pleadings:

1. Plaintiff's Dismissal of Action With Prejudice; and

2. Defendants' Dismissal of Counter-Claim With Prejudice.

Please return all file-stamped copies to our office in the enclosed self-addressed stamped envelope. Your assistance is appreciated and should you have any questions or concerns, please do not hesitate to contact our office.

Sincerely,

Lorrie A. Corbin

LORRIE A. CORBIN
For the Firm

LAC/rl

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TRI-STATE INSURANCE COMPANY,

Plaintiff,

vs

RICHARD E. MARTIN d/b/a REM-TRK,

Defendant.

Case No. 97-CV-1116B (E)

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Tri-State Insurance Company, and the Defendant, Richard E. Martin d/b/a REM-TRK, and stipulate and agree to the Dismissal with Prejudice of all of the Plaintiff's claims in the referenced matter, and to the Dismissal with Prejudice of all of the Defendant's counter-claims in the referenced matter, pursuant to Federal Rule of Civil Procedure 41(a)(1).

WILBURN, MASTERSON & SMILING

By _____

MICHAEL J. MASTERSON, OBA 5769
Attorney for Plaintiff
Tri-State Insurance Company

Executive Center II
7134 South Yale, Suite 560
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(918) 494-0414
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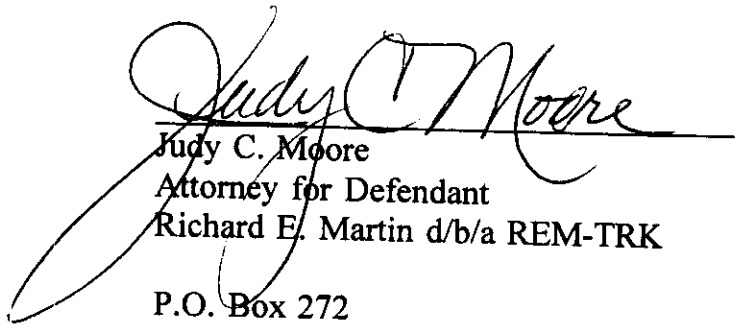

Judy C. Moore
Attorney for Defendant
Richard E. Martin d/b/a REM-TRK

P.O. Box 272
Carthage, MO 64836
(417) 358 2127

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

NORMAN CLARK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 97-C-1093-C
	)	
B.H. INDUSTRIES,	)	
HANDICAPPED INDUSTRIES,	)	
	)	
Defendants.	)	

DEFENDANTS' DISMISSAL OF COUNTER-CLAIM WITH PREJUDICE

COMES NOW, B.H. Industries and Handicapped Industries, and hereby dismisses their counter-claim in the above styled matter with prejudice against the named Plaintiff.

Respectfully submitted,

Lorrie A. Corbin

C. Craig Cole, OBA# 1775
Lorrie A. Corbin, OBA# 16403
C. CRAIG COLE & ASSOCIATES
317 Northwest Twelfth Street
Oklahoma City, Oklahoma 73103
Telephone: (405) 232-8700
Facsimile: (405) 232-1655
ATTORNEY(s) FOR DEFENDANTS

20

CERTIFICATE OF MAILING

This is to certify that on this ____ day of October, 1998 the foregoing pleading was mailed with postage prepaid, via Certified Mail, Return Receipt Requested, to the following named Plaintiff:

Norman Clark
901 N. Elgin, #809
Tulsa, Oklahoma 74126

Lorrie A. Corbin

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE F. GATEWOOD,

Plaintiff,

v.

AMERICAN AIRLINES, INC., and SABRE GROUP, INC., formerly known as Sabre Computer Center, an Operations Division of American Airlines,

Defendants.

Case No. 97-CV-291-B

97CV1080B

JUDGMENT

In keeping with the Order sustaining the motions for summary judgment of the Defendants, American Airlines, Inc., and SABRE Group, Inc., filed contemporaneous herewith, judgment is hereby entered in favor of said Defendants and against the Plaintiff, George Gatewood, and Plaintiff's action is hereby dismissed. Costs are hereby assessed against the Plaintiff and in favor of the Defendants if timely applied for pursuant to Local Rule 54.1, and the parties are to pay their own respective attorneys' fees.

DATED this 30th day of October, 1998.

THOMAS R. BRETT
SENIOR UNITED STATES DISTRICT JUDGE

43/7

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE F. GATEWOOD,

Plaintiff,

v.

AMERICAN AIRLINES, INC., and SABRE GROUP, INC., formerly known as Sabre Computer Center, an Operations Division of American Airlines,

Defendants.

Case No. 97-CV-291-B

97CV1080B

ORDER

Before the Court for decision is the motion for summary judgment pursuant to Fed.R.Civ.P. 56 (docket # 38) of the Defendants, American Airlines, Inc.("American") and SABRE Group, Inc ("SABRE"), in this alleged violation of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, *et seq.*, and the Employee Retirement Income Security Act ("ERISA"), 25 U.S.C. §§ 1140, *et seq.* The Plaintiff did not file his Equal Employment Opportunity Commission ("EEOC") claim until in excess of two years following his employment termination. For the reasons stated hereafter, Defendants' motions for summary judgment are sustained.

Some background to this point is helpful to place the matter in context.

This case was filed on March 31, 1997, nineteen months ago. The Plaintiff has had three separate sets of counsel of record, each of which, after disagreement with Plaintiff,

withdrew.

The first dispositive motion deadline was set for December 5, 1997, and upon joint motion of the parties, the dispositive motion deadline was passed to March 31, 1998. This date was then passed to May 8, 1998. Plaintiff was granted authority to file an amended complaint and the dispositive motion deadline was again set for June 5, 1998. On June 19, 1998, the dispositive motion deadline was again passed to August 28, 1998. Defendants, American and SABRE filed their motion for summary judgment on June 24, 1998. On July 9, 1998, Plaintiff requested additional time to respond in opposition to the Defendants' motion for summary judgment. The Court granted an extension to July 20, 1998. On July 20, 1998, Plaintiff filed a motion for additional time to file opposition to Defendants' motion for summary judgment. On July 22, 1998, Plaintiff dismissed his third attorney herein. On July 22, 1998, Plaintiff was advised to obtain new counsel of record within fifteen days or file a pro se intention, and file a response to Defendants' motion for summary judgment no later than August 10, 1998. The order explicitly stated, "If Plaintiff does not respond to the motion for summary judgment on or before August 10, 1998, Defendants' statement of undisputed facts will be deemed admitted." On August 11, 1998, Plaintiff advised the Court henceforth he would appear pro se. Plaintiff filed his brief in dispute with Defendants' motion for summary judgment one day out of time, seven pages in excess of the twenty-five page local rule limitation (NDLR 7.2C), without court approval. Plaintiff then filed an amended brief in dispute on August 13, 1998. Defendants filed a reply brief on August 24,

1998. Plaintiff, on September 10, 1998, without court approval, filed a response to the Defendants' reply brief. It is being stricken because the court rules do not permit a response to a reply brief. Additionally, it is simply repetitious of Plaintiff's briefs filed August 11 and August 13, 1998. Plaintiff's argument is summed up on page 1 wherein he states:

> "The Plaintiff is in a protected class under Title VII and subtitle ADA, where Plaintiff cannot be fired because he is black and disabled."

Plaintiff's brief in dispute does not comply with Fed.R.Civ.Pro. 56 nor with the Northern District Local Rule 56.1B.[1] Plaintiff's claimed facts in dispute are not supported in the record by affidavit, deposition testimony, answers to interrogatories, or admissions as required by Fed.R.Civ.P. 56.[2] The following are undisputed facts as revealed by the record:

1. Plaintiff began working at American Airlines as a Technical Specialist in computer operations in March of 1986. Exhibit A-Deposition of George Gatewood taken November 24, 1997 ("Gatewood Depo. (Nov. 24, 1997)") at page 33, line 22 to page 34, line 4.

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[1]Local Rule 56.1B states: "Response Brief. The response to a motion for summary judgment (or partial summary judgment) shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.

[2]Plaintiff's only such support is his affidavit filed September 10, 1998, which is insufficient to join issue on the relevant material facts herein and in places is contrary to his previously given deposition testimony. *Franks v. Nimmo*, 796 F.2d 1230,1237 (10th Cir. 1986); *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572 (2nd Cir. 1969), and *Kennett-Murray Corporation v. Bone*, 622 F.2d 887 (5th Cir. 1980).

2. On August 20, 1988, Plaintiff injured his back while lifting a box of computer paper. Exhibit A–Gatewood Depo. (Nov. 24, 1997) at page 4, line 21 and page 44, line 24 to page 45, line 3.

3. Around September 18, 1988 Plaintiff requested, and was placed on approximately eighty (80) days of paid leave due to his injury. This leave lasted until January 6, 1989. Exhibit A–Gatewood Depo. (Nov. 24, 1997) at page 46, lines 4-11; page 50, lines 14-16.

4. Plaintiff returned to work and remained in his previous position until October 12, 1989. Then, pursuant to doctor's orders, Plaintiff was again placed on leave of absence. Exhibit A–Gatewood Depo. (Nov. 24, 1997) at page 46, lines 19-25; page 47 line 22 to page 48 line 1; page 48 lines 9-15; page 72, lines 10-21.

5. Plaintiff never returned to work after October 12, 1989. Exhibit A–Gatewood Depo. (Nov. 24, 1997) at page 51, lines 9-14.

6. Plaintiff has not been released to return to work since November 23, 1989, the date of Plaintiff's most recent back surgery. Exhibit B–Deposition of George Gatewood taken May 20, 1998 ("Gatewood Depo. (May 20, 1998)") at page 238, lines 9-11; page 388, lines 20-23.

7. AA Regulation 145-7 provides that no unpaid sick leave of absence (including injury on duty leave of absence) may exceed five years. Exhibit C - AA Regulation 145-7 at p. 27.

8. Plaintiff was advised by letter dated August 5, 1992 that his leave of absence which began on October 12, 1989 would last five (5) years, after which he would be "administratively terminated." Exhibit D–Letter to Plaintiff from Marilyn Amber, Administrator-Personnel Services, American Airlines; Exhibit A–Gatewood Depo. (Nov. 24, 1997) at page 50, lines 2-12. Plaintiff admits he received this letter and simply "closed his ears" and "didn't pay any attention to that." Exhibit A–Gatewood Depo. (Nov. 24, 1997) at page 134, line 21 to page 137 line 23; page 179 line 23 to page 180 line 2.

9. On October 10, 1994, Plaintiff's employment was administratively terminated because he had remained on leave of absence for over five years. Exhibit B–Gatewood Depo. (May 20, 1998) at page 354, lines 1-5.[3]

10. By February of 1995 Plaintiff had heard he had been terminated. Exhibit B–Gatewood Depo. (May 20, 1998) at page 291 line 24 to page 292, line 1; page 292, lines 7-10.

11. On October 21, 1996 Plaintiff filed a Charge of Discrimination with the EEOC. Exhibit E - Charge of Discrimination.

Plaintiff's Ability to Perform his Job

12. Plaintiff has never been released to return to work and to date Plaintiff's doctors have consistently stated that Plaintiff is totally disabled from his occupation. Exhibit F - Attending Physician's Statement of Functional Capacity forms.

[3]Plaintiff has received worker's compensation benefits as a result of his on-the-job injury and is also receiving long term disability benefits from American Airlines.

13. Due to his total disability, Plaintiff has received and is still receiving long term disability benefits under American's long term disability plan. Exhibit B–Gatewood Depo. (May 20, 1997) at page 246, lines 5-10, 16-20.

14. Plaintiff stated that his job of Technical Specialist Computer Operations requires "lots of standing, walking, sitting, bending, lifting and good concentration." Exhibit G–Statement of Claim Long Term Disability Benefits.

15. As recently as February 1, 1997, and in response to the question "Do you expect to return to your last occupation on a full or part-time basis?" Plaintiff answered, "... my health will not allow me to work without some break-through in pain management." Plaintiff went on to say, "By not being able to stand, walk, sit or have a clear mind, I cannot hold a job." Exhibit H–MetLife Personal Profile Evaluation dated February 1, 1997.

16. Plaintiff never advised the Defendants of any accommodation that could enable him to return to the position of Technical Specialist. Exhibit B–Gatewood Depo. (May 20, 1998) at page 373, lines 5-9.

Plaintiff's Allegations

17. Plaintiff claims his sick pay, holiday pay and vacation pay should have accrued during his leave of absence. Exhibit A–Gatewood Depo. (Nov. 24, 1997) at page 195, lines 3-12. These are the only benefits Plaintiff contends he was denied. Exhibit A–Gatewood Depo. (Nov. 24, 1997) at page 196, lines 6-9.

18. According to the Plaintiff, these benefits should have been paid to him in early

1989 or early 1990. Exhibit B–Gatewood Depo. (May 20, 1998) at page 305, lines 18-24.

19. Sick pay, holiday pay and vacation pay are not distributed pursuant to any ERISA covered plan. Rather, these benefits are paid to employees by way of the regular paychecks, directly from American's general assets. Exhibit I–Affidavit of Brian King ("King Affidavit") at ¶4.

Plaintiff's Relationship with SABRE

20. On July 1, 1996, SABRE became a separate legal entity from American. Exhibit I–King Affidavit at ¶5.

21. Plaintiff has never been employed by SABRE. Exhibit B–Gatewood Depo. (May 20, 1998) at page 266, lines 3-5.

22. Plaintiff has never applied for or been denied employment at SABRE. Exhibit B–Gatewood Dep. (May 20, 1998) at page 242, lines 17-19.

23. Plaintiff has never been a participant in any ERISA covered plan sponsored or administered by SABRE. Exhibit B–Gatewood Depo. (May 20, 1998) at page 266, lines 18-25.

24. SABRE has never denied the Plaintiff any benefit. Exhibit B–Gatewood Depo. (May 20, 1998) at page 274, lines 19-23.

Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a

matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). In *Celotex,* the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th

Cir.1992).

Legal Analysis and Conclusion

1. The ADA and ERISA periods of limitation.

The Plaintiff's claim is untimely. Under 42 U.S.C. §2000e-5(e)(1), applicable to disability claims under 42 U.S.C. §12117(a), an ADA claimant must file a charge of discrimination with the EEOC and/or the OHRC within 300 days of the date of the alleged discrimination. *Aronson v. Gressly*, 961 F.2d 907, 911 (10th Cir. 1992).

The uncontroverted evidence reveals the Plaintiff was terminated on October 10, 1994, but Plaintiff did not file his EEOC complaint until October 21, 1996, in excess of two years later. [Uncontroverted Facts Nos. 9 and 11]. The Plaintiff was advised by letter dated August 5, 1992, that his leave of absence beginning on October 12, 1989 would expire in five years and his employment would be terminated. The Plaintiff's employment was terminated on October 10, 1994, because he remained on the leave of absence status for the five year period. The Plaintiff admits that by February of 1995, he learned his employment had been terminated by American Airlines. [Uncontroverted Facts Nos. 8, 9, and 10]. The Plaintiff failed to file his ADA claim within 300 days of his termination.

The Plaintiff alleges two ERISA causes of action. The first is that the Defendants discharged Plaintiff to interfere with his rights under ERISA and, second, Plaintiff asserts he was denied ERISA protected benefits.

29 U.S.C. §1140 provides that it is unlawful for an employer to discharge a plan

participant for exercising a right to which the employee is entitled under an ERISA covered plan. Since ERISA has no stated statute of limitations for such claims, the courts look to analogous state limitations periods. The Tenth Circuit has held that the most analogous period of limitation is that applicable to state employment discrimination claims. *Held v. Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197, 1206-07 (10th Cir. 1990). Oklahoma provides for a two year statute of limitations in such cases. 25 O.S. 1991 § 190(E); *Duncan v. City of Nichols Hills*, 913 P.2d 1303 (Okla. 1996). Plaintiff did not commence this action until March 31, 1997, so it is untimely because it was filed in excess of two years after his October 12, 1994 employment termination date.

Plaintiff further alleges that he was denied sick pay, vacation pay and holiday pay that should have accrued while he was on leave of absence. [Uncontroverted Fact No. 17]. Such benefits are not protected under ERISA but if they were they were denied Plaintiff in the 1989 or 1990 time frame. The private right of action under 29 U.S.C. §1132(a)(1)(B) for denial of benefits under ERISA accrues when the benefit is denied. *Held*, 912 F.2d at 1205. Since ERISA contains no specific statute of limitation for denial of benefit claims, the Tenth Circuit has held that the most analogous Oklahoma statute of limitations is the five-year statute of limitations applicable to written contracts. *Wright v. Southwestern Bell*, 925 F.2d 1288 (10th Cir. 1991). Plaintiff did not file this ERISA complaint until March 31, 1997, in excess of seven years after the alleged denial of benefits due. The Plaintiff's claim is, therefore, beyond the period of limitations.

2. The ADA claim.

Plaintiff urges he was terminated because of his alleged disability.

For the Plaintiff to establish a *prima facie* case of disability discrimination under the ADA, he must establish the following elements by a preponderance of the evidence:

1) that he is a disabled person within the meaning of the ADA;

2) that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job; and

3) that his employer took an adverse employment action because of his disability.

Milton v. Scrivner, Inc., 53 F.3d 1118, 1123 (10th Cir. 1995); *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 371 (6th Cir. 1997). Plaintiff's ADA claim cannot survive if he fails to come forward with evidence on any one of these three essential elements.

In addressing a claim brought under the ADA where the plaintiff has no direct evidence of discrimination, the court must apply the summary judgment standard in conjunction with the burden shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). If the plaintiff establishes a *prima facie* case this creates a presumption that the plaintiff was discharged for an illegal reason. The presumption then places upon the defendant the burden of producing an explanation to rebut the *prima facie* case, i.e., the burden of producing evidence that the discharge occurred for a legitimate, nondiscriminatory reason. If the defendant carries this burden of production, and articulates a legitimate nondiscriminatory reason for the

discharge, the presumption is rebutted and drops from the case. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981). The plaintiff then must show that the discharge occurred for an illegal reason by showing that the stated reason is a pretext for illegal discrimination or by presenting direct evidence of discrimination. *Ingels v. Thiokol Corp.*, 42 F.3d 616, 621 (10th Cir. 1991).

It is uncontroverted the Plaintiff herein is disabled. However, it is uncontroverted that Plaintiff is not "qualified," i.e., able to perform the essential functions of the job in question with or without reasonable accommodation. The Plaintiff's physicians have stated he is totally disabled from his occupation [Uncontroverted Fact No. 12]. He has not been released to return to work since his last back surgery on November 12, 1989. [Uncontroverted Fact No. 6]. The uncontroverted evidence shows that the Plaintiff is not able to perform the essential functions of his employment position with or without accommodation. The fact question concerning Plaintiff's qualification to perform the essential functions of the job, with or without reasonable accommodation, is to be viewed as of the date the employment decision is made. *Weiler v. Household Finance Corporation*, 101 F.3d 519, 524 (7th Cir. 1996), and *Hudson v. MCI Telecommunications Corporation*, 87 F.3d 1167 (10th Cir. 1996). The Plaintiff's own statements establish that he is unable to perform the essential functions of his position. [Uncontroverted Fact No. 15]; *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998). Plaintiff has not advised the Defendants of any accommodation that would enable him to return to his previous

position at American Airlines. [Uncontroverted Fact No. 16].

The Defendants have presented evidence that Plaintiff's termination was pursuant to a neutral policy by which no leave of absence may last longer than five years. [Uncontroverted Facts Nos. 7 and 9]. The Plaintiff has presented no evidence that the legitimate nondiscriminatory reason for his termination is pretextual. *Ingels*, 42 F.3d at 621.

3. **The ERISA Claim**.

Plaintiff asserts that the only benefits denied him by American were sick pay, vacation pay and holiday pay from 1988 and 1989. [Uncontroverted Fact No. 17]. Such benefits are paid by American Airlines out of its general assets, not any kind of plan, fund or program. [Uncontroverted Fact No. 19].

The regulations of the Secretary of Labor exclude certain "pay roll practices" from the coverage of ERISA. They provide an employee benefit plan does not include:

> (1) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties, or is otherwise absent for medical reasons ...; or
>
> (2) payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons ... performs no duties; for example
>
> (a) payment of compensation while an employee is on vacation or absent on a holiday ...

29 C.F.R. § 2510.3-1(b)(2) and (b)(3). Therefore, ERISA jurisdiction does not apply to these

claimed payroll practices and Defendants are entitled to summary judgment as to Plaintiff's denial of benefits claim. *Massachusetts v. Morash*, 490 U.S. 107 (1989), and *McKinsey v. Sentry*, 986 F.2d 401 (10th Cir. 1993).

To state a *prima facie* case of ERISA interference, a plaintiff must show (1) prohibited conduct; (2) taken for the purpose of interfering; and (3) with the attainment of any right to which the employee may become entitled under ERISA. *Maez v. Mountain States Telephone & Telegraph, Inc.*, 54 F.3d 1488 (10th Cir. 1995). Courts employ the *McDonnell Douglas* burden shifting approach as set forth previously in reference to such claims. Herein, the Defendants have set forth a legitimate nondiscriminatory reason for its employment decision, i.e., the Plaintiff's leave of absence status for five years and the Plaintiff has presented no evidence of pretext. Further, it is clear the Defendants did not interfere with any ERISA rights of the Plaintiff.

The uncontroverted evidence establishes that the Plaintiff has never been employed by the Defendant SABRE nor denied any ERISA benefits by SABRE. [Undisputed Facts Nos. 21-24]. The Court notes the following statement by Plaintiff on the final page of his brief in dispute with Defendants' motion for summary judgment filed on August 13, 1998:

> "For the foregoing reasons, American Airlines and SABRE should not be granted summary judgment and Plaintiff's case should be dismissed with or without prejudice."

For the reasons stated above, the motions for summary judgment of the Defendants, American Airlines, Inc., and SABRE Group, Inc., are hereby sustained and a separate

judgment in favor of the Defendants and against the Plaintiff will be entered contemporaneously with the filing of this order.

DATED this 30th day of October, 1998.

THOMAS R. BRETT
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN WINTON and EVELYN WINTON,

Plaintiffs,

vs.

BOARD OF COUNTY COMMISSIONERS OF TULSA COUNTY, OKLAHOMA; STANLEY GLANZ, Tulsa County Sheriff; JACK PUTNAM; and WEXFORD HEALTH SOURCES, INC.,

Defendants.

Case No. 97-CV-841-C(J)

REPORT AND RECOMMENDATION

Now before the Court is the "Motion to Dismiss Under Rule 12(b)(6) For Failure to State a Claim" filed by all Defendants except Wexford Health Sources, Inc. ("Wexford"). [Doc. No. 7].[1/] The motion has been referred to the undersigned for a report and recommendation pursuant to 28 U.S.C. § 636. For the reasons discussed below, the undersigned recommends that Defendants' motion be **DENIED**.

I. INTRODUCTION

Plaintiff, John Winton, was a pretrial detainee in the Tulsa County Jail ("the jail") from September 5, 1995 to September 19, 1995 when he bonded out of the jail. Mr. Winton alleges that "[i]n the late evening of September 16 or the early morning of

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[1/] A reference to Defendants in this Report and Recommendation is a reference to the Board of County Commissioners of Tulsa County, Oklahoma ("the Board"); Stanley Glanz, individually and in his official capacity as Tulsa County Sherif; and Jack Putnam.

September 17, 1995, [he was] brutally and savagely attacked and beaten by other inmates in the Tulsa County Jail." Doc. No. 2, ¶ 20. As a result of the attack, Mr. Winton alleges that he suffered "a closed head injury, an interparenchymal hemorrhage, a subdural hematoma, a basal skull fracture, a separation of the right shoulder and a left wrist fracture." Id. at ¶ 21. Plaintiff alleges that he received no medical treatment from Wexford or the jail staff for the two days he remained in the jail after the beating. When Plaintiff bonded out of the jail two days after the beating, he went immediately to a local emergency room and was admitted to the hospital.

Plaintiffs' Amended Complaint asserts the following claims:

1. Claims under 42 U.S.C. § 1983 – Plaintiffs assert § 1983 claims against the Board, Mr. Glanz and Mr. Putnam for violations of Mr. Winton's Fourteenth Amendment rights as a pretrial detainee. Specifically, Plaintiffs allege (1) that the Defendants were deliberately indifferent to conditions at the Tulsa County Jail which created an unreasonable risk that Mr. Winton would be injured by inmate-on-inmate violence; and (2) that once Mr. Winton was the victim of inmate-on-inmate violence, Defendants failed to provide Mr. Winton with adequate medical care. See Doc. No. 2, First and Second Claims.

2. Negligence Claims – Wexford contracted with the Board to provide medical care to inmates in the jail during the relevant time period. Plaintiffs assert a negligence claim against Wexford based on Wexford's alleged failure to adequately and timely diagnose and treat Mr. Winton's injuries. See Doc. No. 2, Third Claim. Plaintiffs assert negligence claims against Mr. Glanz and Mr. Putnam for allowing conditions to exist at the jail which caused or contributed to Mr. Winton's injuries. Id. Fourth Claim.

3. Loss of Consortium Claim – John Winton is Evelyn Winton's husband. Mrs. Winton alleges that due to her husband's injuries she was "deprived of the consortium,

companionship, and services of her husband . . . ." Doc. No. 2, Fifth Claim.

II. DISCUSSION

Defendants' Rule 12(b)(6) motion to dismiss is directed solely at the § 1983 claims asserted against Defendants (i.e., the First and Second Claims). The negligence claims asserted against Mr. Glanz, Mr. Putnam and Wexford (i.e., the Third and Fourth Claims) are not challenged by the motion to dismiss.

The purpose of Defendants' Rule 12(b)(6) motion is to test the legal sufficiency of the Plaintiffs' statement of a claim for relief in their Amended Complaint. A Rule 12(b)(6) motion is not used to resolve contests about the facts or merits of a case. The Court's inquiry is, therefore, limited to the contents of the Plaintiffs' Amended Complaint.

When ruling on Defendants' Rule 12(b)(6) motion to dismiss, the Court must accept all well-pled factual allegations in the Amended Complaint as true, and the Court must view all inferences that can be drawn from those well-pled facts in the light most favorable to Plaintiffs. Viewing the allegations in the Amended Complaint through this lens, the Court may grant Defendants' Rule 12(b)(6) motion only if "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim[s] which would entitle [them] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). See also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 166-67 (1993); and GFF Corporation v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir. 1997). The Court must also

be mindful of the fact that the Tenth Circuit has recognized that the Federal Rules of Civil Procedure "erect a powerful presumption against rejecting pleadings for failure to state a claim." Maez v. Mountain Home Telephone and Telegraph, Inc., 54 F.3d 1488, 1496 (10th Cir. 1995). Thus, the burden is on the Defendants to establish that no claim exists given the well-pled allegations in Plaintiffs' Amended Complaint.

The United States Supreme Court has specifically held that the denial of medical care and the failure to protect an inmate from a substantial risk of serious harm from other inmates are both actionable under the Eighth Amendment to the United States Constitution. See Estelle v. Gamble, 429 U.S. 97 (1976) (denial of medical care); and Farmer v. Brennan, 511 U.S. 825 (1994) (failure to protect an inmate from violence by other inmates). However, the Eighth Amendment only applies after an adjudication of guilt. Thus, the Eighth Amendment does not apply directly to pretrial detainees like Mr. Winton. Nevertheless, the Supreme Court and the Tenth Circuit have held that the Eight Amendment's protections apply to pretrial detainees through the due process clause of the Fourteenth Amendment. The Fourteenth Amendment due process rights of a pretrial detainee are at least as great as the Eighth Amendment rights of a convicted prisoner. See Bell v. Wolfish, 441 U.S. 520, 535-37 (1979); Garcia v. Salt Lake County, 768 F.2d 303, 307 (10th Cir. 1985); and Barrie v. Grand County, Utah, 119 F.3d 862, 867 (10th Cir. 1997).[2/] Thus, if Plaintiffs can establish a violation of

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[2/] The Eighth Amendment is part of the Bill of Rights contained in the federal constitution. On its face, the Bill of Rights applies only to the federal government. Through the doctrine of incorporation, however, the United States Supreme Court has applied various provisions of the Bill of Rights to the states. In short, the Supreme Court has determined that certain rights in the Bill of Rights are so fundamental that (continued...)

the Eighth Amendment under either Estelle or Farmer, then Plaintiffs can establish that Mr. Winton's Fourteenth Amendment rights, as a pretrial detainee, have been violated.

To prevail on their Rule 12(b)(6) motion to dismiss, Defendants bear the burden of establishing that Plaintiffs can prove no set of facts which would establish a violation of the Fourteenth Amendment under Estelle (denial of medical care) or Farmer (failure to protect an inmate from violence by other inmates). Defendants' entire attack against Plaintiffs' § 1983 claims is contained in the following sentence:

> Examining the allegations of the Plaintiff [sic throughout] contained in their Amended Complaint of September 19, 1997, in a light most favorable to the Plaintiff, Plaintiff failed to allege any facts that would show any of the Defendants either acted or failed to act in a manner which denied the Plaintiffs their Fourteenth Amendment rights.

Doc. No. 7, p. 2. Other than this conclusory statement, Defendants' brief in support of its motion to dismiss is completely devoid of any legal authority or analysis.

Defendants discuss none of the relevant Supreme Court and Tenth Circuit precedent cited above. Defendants have failed to parse the Amended Complaint in an effort to demonstrate why the allegations in the Amended Complaint fail to state a claim under either Estelle or Farmer. If Defendants wish to prevail on their motion to dismiss, their counsel must engage in a more substantive legal analysis than is currently reflected in the brief in support of the motion to dismiss. Defendants have

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[2/] (...continued)
they are encompassed within the term "liberty" as that term is used in the due process clause of the Fourteenth Amendment, which is directly applicable to the states. One of the rights found by the Supreme Court to be "incorporated" into the due process clause of the Fourteenth Amendment is the Eighth Amendment's right to be free from cruel and unusual punishment. See Robinson v. California, 370 U.S. 660 (1962).

completely failed to carry their burden on a Rule 12(b)(6) motion. Consequently, the undersigned recommends that the Defendants' Rule 12(b)(6) motion be **DENIED**.

The undersigned also recommends that this case be set for a Case Management Conference and that a Scheduling Order be put in place so that this case can proceed expeditiously.

OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 30 day of October 1998.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 2 Day of November, 1998.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

DEBORAH JOHNSTON and DIANA RUSS, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

VOLUNTEERS OF AMERICA OKLAHOMA, INC.,

Defendant.

No. 96-CV-1166K
(Consolidated with
97-CV-740 K)

STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

It is hereby stipulated and agreed to by and between the parties herein, in accordance with FED. R. CIV. P. 41, to dismiss without prejudice the following individual Plaintiffs only: Lynette Clark, Alicia Ortiz, Connie Reed, Latasha Ruff, Larry Summers, and Lisa Stucks.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN

STEVEN R. HICKMAN
Attorney for Plaintiffs

RHODES, HIERONYMUS, JONES,
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502 W. Sixth
Tulsa, Oklahoma 74119-1010
(918) 587-3161

Attorneys for Defendant, Volunteers of America Oklahoma, Inc.

CERTIFICATE OF MAILING

I hereby certify that on the 30th day of October, 1998, a true and correct copy of the foregoing was mailed with proper postage thereon prepaid to Steven R. Hickman, P.O. Box 799, Tulsa, OK 74101-0799, Patricia Bullock, 320 S. Boston, Suite 718, Tulsa, OK 74103-3783, Mark Jones, 4545 N. Lincoln, Suite 260, Oklahoma City, OK 73105-3498, and Stephen L. Andrew, 125 W. Third, Tulsa, OK 74103.

JAD/bjo
673-60
DISMISS3rd

#93

ENTERED ON DOCKET
DATE 11-2-98

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., an Oklahoma corporation,	)	
Plaintiff,	)	
v.	)	**Case No. 97CV 138K**
SAN DIEGO RENT-A-CAR, a California corporation, and SAM A. LADKI, an individual,	)	
Defendants.	)	

FILED

AGREED JUDGMENT

Now on this 2 day of November, the referenced case comes on before the undersigned Judge. The Court finds that the parties have agreed to the entry of this Agreed Judgment as evidenced by the signatures of the parties and their counsel. Therefore, the Court hereby enters this Agreed Judgment in favor of the Plaintiff, Thrifty Rent-A-Car System, Inc. ("Thrifty") pursuant to the terms of a Settlement and Release Agreement entered into between Plaintiff and San Diego Rent-A-Car and Sam A. Ladki as of the 12 day of December, 1997 (the "Settlement Agreement").

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Judgment be, and hereby is, entered in favor of the Plaintiff, Thrifty Rent-A-Car System, Inc., and against the Defendants San Diego Rent-A-Car and Sam A. Ladki, jointly and severally, in the amount of Seven Hundred and Fifty Thousand and 00/100 Dollars ($750,000). This Judgment shall bear interest at the statutory rate until paid and Thrifty shall be entitled to recover its costs incurred in connection

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with reopening the case and collecting this Judgment, including reasonable attorneys fees and court costs. The amount of the this Judgment shall be reduced by any payments of principal made by the Defendants under the Settlement Agreement.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON

By: _____

Steven W. Soulé, OBA #13781
320 South Boston Avenue, Suite 400
Tulsa, OK 74103
(918) 594-0466
(918) 594-0505 (Facsimile)

ATTORNEYS FOR THRIFTY RENT-A-CAR SYSTEM, INC.

THRIFTY RENT-A-CAR SYSTEM, INC.,
an Oklahoma corporation

By: _____

PRAY, WALKER, JACKMAN, WILLIAMSON & MARLAR

By: _____

J. Warren Jackman, OBA #4577
Pray, Walker, Jackman, Williamson & Marlar
900 Oneok Plaza
100 West 5th Street
Tulsa, OK 74103-4218

ATTORNEYS FOR DEFENDANTS SAM A. LADKI AND SAN DIEGO RENT-A-CAR

_____

SAM A. LADKI, individually

SAN DIEGO RENT-A-CAR,
a California corporation

By: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

Kelly Zimmerman,

Plaintiff,

v.

TAX AND ACCOUNTING SOFTWARE CORPORATION, an Oklahoma corporation,

Defendant.

No. 98-CV-0164K(E)

ENTERED ON DOCKET
DATE 11-2-98

ORDER OF DISMISSAL

This cause having come before this Court on the Joint Application for Dismissal with Prejudice of the parties, and this Court being fully advised in the premises, and the parties having stipulated and the Court having found that the parties have reached a private settlement of the claims of Plaintiff, and that such claims should be dismissed with prejudice, it is, therefore,

ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiff, together with any causes of action asserted therein, be and hereby are dismissed with prejudice. Each party is to bear its own attorney fees and costs.

So Ordered this 2 day of November, 1998.

Jerry C. Kern
United States District Judge

APPROVED AS TO FORM AND CONTENT:

Attorney for Plaintiff

Attorney for Defendants

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELLSWORTH MOTOR FREIGHT LINES, INC.,	)	
Plaintiff,	)	
vs.	)	No. 96-CV-901-K
NORTH AMERICAN RESOURCES, INC.; BLACK CREEK LAND AND MINERAL, INC.; SILVER CREEK RESOURCES, INC.; FOSTER COAL COMPANY; BARR LAND, INC.; and DERRELL CHAMBLEE,	)	
Defendants.	)	

JUDGMENT

This action came for consideration by the jury, Honorable Terry C. Kern, Chief Judge, presiding, and the issues having been duly heard and a verdict having been duly rendered,

IT IS THEREFORE ORDERED that the plaintiff Ellsworth Motor Freight Lines, Inc. recover of the defendant North American Resources, Inc. the sum of $640,006.66 plus prejudgment interest as to plaintiff's claim for breach of contract.

It is further ordered that judgment be entered in favor of plaintiff and against all defendants as to plaintiff's claims of fraudulent inducement. In regard to this claim, plaintiff is entitled to recover from the defendants jointly and severally the sum of $51,200.00. Judgment is also entered in favor of the plaintiff as to all defendants regarding plaintiff's claims of fraudulent transfer and aiding and abetting, but zero damages are awarded, in accordance with the verdict.

It is further ordered that plaintiff recover as punitive damages the sum of $35,000.00 from defendant North American Resources, Inc., the sum of $43,500.00 from defendant Foster Coal

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Company, and the sum of $62,000.00 from defendant Derrell Chamblee.

All of the amounts listed above shall be assessed interest at the rate of 4.730% per annum from the date of Judgment until paid.

IT IS SO ORDERED THIS 30 DAY OF OCTOBER, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRYE ADAMS,

Plaintiff,

-vs-

GOOD SHEPHERD HOSPICE, L.L.C., JIM BARTON and STEVE MOORE,

Defendants.

ENTERED ON DOCKET
DATE 11-2-98

Case No. 97-CV-984H (W)

(District Court of Tulsa Co., State of Oklahoma, Case No.: CJ-97-04728)

FILED
OCT 29 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

ON the 2nd day of October, 1998, this matter came on before the undersigned Judge pursuant to Defendant Steve Moore's Motion to Dismiss and the Motion for Summary Judgment of Defendants Good Shepherd Hospice, L.L.C., Jim Barton and Steve Moore. The Court, after reviewing the entire record before it, including the parties' briefs and exhibits thereto, after hearing argument of counsel and being otherwise fully advised in the premises, finds and orders as follows.

1. With respect to the claims of Plaintiff against the Defendant Steve Moore, the Court orders:

a. Defendant Moore's Motion to Dismiss addressing the Plaintiff's claims against Defendant Moore under the theories of negligence and Title VII sexual harassment should be and the same hereby is granted and said claims are hereby dismissed for failure to state claims upon which relief can be granted.

b. The Motion for Summary Judgment of Defendant Moore addressing the Plaintiff's claim of intentional infliction of emotional distress against Defendant Moore is hereby granted on the basis there is no genuine issue as to any material fact and Defendant Moore is entitled to judgment as a matter of law. It is therefore ordered, adjudged and decreed that Plaintiff, Terrye Adams, take nothing by reason of her claim for intentional infliction of emotional distress against Defendant Moore.

c. There being no further claims against Defendant Moore, it is therefore ordered, adjudged and decreed that judgment be entered in favor of Defendant Moore and against the Plaintiff, Terrye Adams.

2. With respect to the claims of Plaintiff against the Defendant Jim Barton, the Court orders:

a. The Motion for Summary Judgment of Defendant Barton addressing the Plaintiff's claim of intentional infliction of emotional distress against Defendant Barton is hereby granted on the basis there is no genuine issue as to any material fact and Defendant Barton is entitled to judgment as a matter of law. It is therefore ordered, adjudged and decreed that Plaintiff, Terrye Adams, take nothing by reason of her claim for intentional infliction of emotional distress against Defendant Barton.

b. There being no further claims against Defendant Barton, it is therefore ordered, adjudged and decreed that judgment be entered in favor of Defendant Barton and against the Plaintiff, Terrye Adams.

3. With respect to the claims of Plaintiff against the Defendant Good Shepherd Hospice, L.L.C., the Court orders:

a. The Motion for Summary Judgment of Defendant Good Shepherd Hospice, L.L.C. addressing the Plaintiff's claim of intentional infliction of emotional distress against Defendant Good Shepherd Hospice, L.L.C. is hereby granted on the basis there is no genuine issue as to any material fact and Defendant Good Shepherd Hospice, L.L.C. is entitled to judgment as a matter of law.

b. The Motion for Summary Judgment of Defendant Good Shepherd Hospice, L.L.C. addressing the Plaintiff's Title VII sexual harassment claim against Defendant Good Shepherd Hospice, L.L.C. based upon the statements of Steve Moore is hereby granted on the basis there is no genuine issue as to any material fact and Defendant Good Shepherd Hospice, L.L.C. is entitled to judgment as a matter of law. The Motion for Summary Judgment of Defendant Good Shepherd Hospice, L.L.C. addressing the Plaintiff's claim for Title VII sexual harassment is otherwise denied.

c. The Motion for Summary Judgment of Defendant Good Shepherd Hospice, L.L.C. addressing the Plaintiff's claim for wrongful termination based upon the Plaintiff's internal reporting of alleged falsification of time and mileage allegedly resulting in Medicare fraud is taken under consideration by the Court.

d. It is therefore ordered, adjudged and decreed that Plaintiff, Terrye Adams, take nothing by reason of her claim for intentional infliction of emotional distress against Defendant Good Shepherd Hospice, L.L.C. and that judgment be entered in favor of Defendant Good Shepherd Hospice, L.L.C. on said claim.

It is further ordered, adjudged and decreed that Plaintiff, Terrye Adams, take nothing by reason of her Title VII sexual harassment claim against Defendant Good Shepherd Hospice, L.L.C. based on the statements of Steve Moore and that judgment be entered in favor of Defendant Good Shepherd Hospice, L.L.C. on said claim.

It is further ordered, adjudged and decreed that Plaintiff's claim for wrongful termination is taken under advisement.

It is further ordered, adjudgec and decreed that this matter shall otherwise proceed to trial with respect to Plaintiff's Title VII sexual harassment claim.

IT IS SO ORDERED.

DATED this 29TH day of October, 1998.

SVEN ERIK HOLMES
U.S. District Court Judge

APPROVED:

As to Form

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Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELLSWORTH MOTOR FREIGHT LINES, INC.,	)	
Plaintiff,	)	
vs.	)	No. 96-CV-901-K
NORTH AMERICAN RESOURCES, INC.; BLACK CREEK LAND AND MINERAL, INC.; SILVER CREEK RESOURCES, INC.; FOSTER COAL COMPANY; BARR LAND, INC.; and DERRELL CHAMBLEE,	)	
Defendants.	)	

ORDER

Before the Court are the briefs of the parties on jury verdict judgment. This case came on for jury trial in September, 1998, and the jury reached a unanimous verdict. Plaintiff contends that the verdict is inconsistent and must be reconciled by the Court or a new trial ordered on damages. The Court hereby addresses the issues raised, declines to order a new trial on damages, and enters judgment.

On the verdict form titled "Plaintiff's Breach of Contract Claim", the jury found in favor of plaintiff and against defendant North American Resources, Inc. ("North American") and awarded damages in the amount of $640,006.66. On the verdict form titled "Plaintiff's Fraud Claims", the jury found that North American functioned as the agent for the other co-defendants as regards the fraud claims. Regarding plaintiff's claim of fraudulent inducement, the jury found in plaintiff's favor, but only entered a finding of liability against North American and Foster Coal

Company ("Foster Coal"). Further, the amount of damages awarded was $51,200. Regarding plaintiff's claim of fraudulent transfer, the jury found in plaintiff's favor, and entered a finding of liability against defendants North American, Foster Coal and Derrell Chamblee ("Chamblee"). The amount of damages entered as the fraudulent transfer claim was zero. Regarding plaintiff's claim for aiding and abetting, the jury found in plaintiff's favor and entered a finding of liability against defendants North American, Foster Coal and Chamblee. Again, the jury entered a zero as to damages.

In the first phase of trial, the jury also found by clear and convincing evidence that defendants North American, Foster Coal and Chamblee acted in reckless disregard for the rights of others. Thus, a second phase was held as to punitive damages. After that phase, the jury returned a verdict awarding plaintiff $35,000 as against North American, $43,500 as against Foster Coal and $62,000 as to Chamblee. The Court withheld entering judgment pending submission of the briefs which are now before it.

First, plaintiff seeks to hold all defendants liable for breach of contract based upon the jury's finding of agency as to the fraud claims. Agency is not a "one size fits all" concept. The jury found, and sufficient evidence supported, North American acted as co-defendants' agent in the perpetrating of fraud upon plaintiff. This is not a finding that North American acted as co-defendants' agents in the making of the contract. The Court did not submit this issue to the jury, because no evidence was presented that North American was authorized to enter contracts on behalf of the co-defendants. To the extent plaintiff relies upon "apparent authority", at most the evidence suggested that plaintiff believed some or all of the co-defendants might act as guarantors of the contract between plaintiff and North American, but plaintiff never sought such guarantees.

The Court, perhaps inartfully, framed the interrogatory as whether North American functioned as the agent of the co-defendants "in its dealings" with plaintiff. However, the interrogatory appears on the verdict form addressing the fraud claims, and these were the "dealings" which the interrogatory referenced. A separate interrogatory, for the wholly different question of agency as to contracts, would have been submitted to the jury if evidentiary support existed for such a finding, but the Court concluded it did not. Plaintiff did not request such a separate interrogatory when the final version of the verdict forms was presented for counsel's review.[1]

As to the fraud verdict, as the Court stated at the time the verdict was returned, the Court is persuaded that the findings mandate a judgment against all defendants. The first interrogatory asked the jury for a finding on the question of agency. The subsequent interrogatories asked for a determination as to each defendant individually. The intent of the Court was to achieve findings as to both "fraud by agency" and direct acts of fraud, if any, by each defendant. More guidance perhaps should have been provided the jury in this regard, but the manner in which the jury answered the questions renders any such objection moot. The jury found North American liable for fraud in its dealings with plaintiff as to each fraud claim. The jury also found that North American functioned as the agent for the other co-defendants in those fraudulent acts. Therefore, by operation of law, the other co-defendants are also liable for fraud. See Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1556 (10th Cir.1995)(principal liable for agent's tortious acts committed in the

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[1]Plaintiff chides the Court for providing the jury with "inappropriate and confusing jury verdict forms." Again, plaintiff articulated no objections to the final version of the verdict forms. Apparently, what plaintiff now views as manifest defects were elusive at the time it was appropriate to raise such issues, and the time most helpful to the Court. Plaintiff also declined the opportunity to submit additional interrogatories to the jury immediately after the "phase 1" verdict was received.

course of the agency). During a brief discussion with the attorneys prior to the "phase 2" proceedings, Ms. Goldson, counsel for the "Missouri defendants", conceded this point of law.

Plaintiff protests that the jury's finding of damages of $51,200 on the fraudulent inducement claim cannot be appropriate in view of the contractual damages of over $640,000. Oklahoma law simply holds that fraudulent inducement constitutes a tort for which actual and punitive damages are available. Oklahoma Federated Gold and Numismatics v. Blodgett, 24 F.3d 136, 142 (10th Cir.1994). Plaintiff has cited no authority for the proposition that the amount of damages on the two claims must be identical. Plaintiff cites authority discussing an improper award of nominal damages, but $51,200 does not qualify as nominal damages. The "Missouri defendants" suggest that "[t]he evidence would support the jury questioning Plaintiff's right to rely on any conduct that it deemed fraudulent and may have calculated the amount of damages by looking at invoices for only a certain window of time." (Missouri defendants' brief at 7). In any event, the Court is not persuaded it should intrude itself into the jury's calculations in this instance.

Plaintiff also attacks the jury's entries of zero damages despite its finding in favor of plaintiff on the fraudulent transfer and aiding and abetting claims. The Missouri defendants argue that "[t]he jury could have found that the asset(s) transferred had no value or that Plaintiff failed to meet its burden of proof to show the value of the assets transferred." (Missouri defendants' brief at 3). Again, the Court has no access to the jurors' thought processes, but does not find the result to reflect such an implausible view of the evidence that the result should be overruled.[2]

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[2]It also bears repeating that the opportunity was offered, but declined, for counsel to craft additional interrogatories for the jury immediately after the "phase 1" verdict was returned.

Finally, plaintiff seeks prejudgment interest as to its breach of contract claim and post-judgment interest as to all claims. The Missouri defendants correctly note that "[u]nder Oklahoma law, prejudgment interest on amounts owing on damages for breach of contract is only available if it is provided for in the contract or if the damages are liquidated." (Missouri defendants' brief at 4), citing Pierce, Couch, Hendrickson, Baysinger & Green v. Freede, 936 P.2d 906, 913-14 (Okla.1997). There is no provision in this contract entitling plaintiff to interest. However, the Missouri defendants also concede, as they must, that North American stipulated to the amount of damages recoverable should the jury return a verdict in plaintiff's favor on the breach of contract claim. Plaintiff asserts that this stipulation renders the damages liquidated, while the Missouri defendants ask the Court to consider the "ramifications" of such a holding, i.e., a party will no longer stipulate to contractual damages. Whatever such ramifications may be, plaintiff correctly notes that the Oklahoma Supreme Court has upheld an award of prejudgment interest on a stipulated amount of damages. Heiman v. Atlantic Richfield Co., 891 P.2d 1252 (Okla.1995). Other courts have reached similar results regarding contractual damages. See United States v. Commercial Construction Corp., 741 F.2d 326, 329 (11th Cir.1984). The Court will award prejudgment interest on the breach of contract claim. Plaintiff has not provided a calculation for such interest, other than setting forth the interest rates for the years 1996, 1997 and 1998. If plaintiff files a motion to alter or amend judgment pursuant to the Federal Rules of Civil Procedure, in which plaintiff sets forth a stipulation or calculation of an exact figure of such interest, the Court will enter an Amended Judgment.

Defendants do not dispute plaintiff's entitlement to post-judgment interest on the verdict, and all parties agree that 28 U.S.C. §1961 is the governing provision. Such interest shall be included in the judgment.

It is the Order of the Court that judgment be entered in accordance with the rulings made above.

IT IS SO ORDERED THIS 30 DAY OF OCTOBER, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANTHONY L. COCHRANE,
SSN: 447-70-4993,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 97-CV-790-M

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 30th day of OCT., 1998.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

(16)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ANTHONY L. COCHRANE,
SSN: 447-70-4993,

PLAINTIFF,

vs.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,

DEFENDANT.

CASE NO. 97-CV-790-M

ORDER

Plaintiff, Anthony L. Cochrane, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26

[1] Plaintiff's September 8, 1994 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held May 8, 1996. By decision dated June 24, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on July 9, 1997. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

(13)

F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born September 15, 1975 and was 20 years old at the time of the hearing. [R. 32]. He claims to have been unable to work since September 8, 1994 due to a gunshot wound to his upper left thigh. [R. 166, Plaintiff's Brief, p. 1].

The ALJ determined that Plaintiff has a severe impairment consisting of status post gunshot wound to the left thigh with sciatic nerve injury but that he retained the residual functional capacity (RFC) to perform the full range of light work. [R.20-21]. He determined that Plaintiff has no past relevant work and, relying upon the grids, found that Plaintiff was not disabled as defined by the Social Security Act. [R. 21]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ's findings concerning his residual functional capacity (RFC) are not supported by the record, that the ALJ erroneously applied the grids and that his findings regarding Plaintiff's depression are incomplete. [Plaintiff's Brief, p. 2].

For the reasons discussed below, the Court affirms the decision of the Commissioner.

Plaintiff's First Statement of Error

Plaintiff first claims the record established his condition was disabling and that the ALJ did not point to specific evidence to support his RFC determination. He states there is no evidence in the record that supports the ALJ's finding that Plaintiff can lift 20 pounds and stand or walk for 6 hours out of an 8 hour workday.

The record reveals that Plaintiff sustained a gunshot wound to the left upper thigh on August 26, 1994 and was hospitalized. [R. 76-87]. His treating physicians determined, after reviewing an MRI, that surgery to remove the bullet fragments was not indicated. [R. 92-93]. He was "tried on various medications" and he participated in PT, OT and TR therapy. *Id.* His progress was closely monitored by Drs. Kache, Tillim and Pittman and, on December 8, 1994, Dr. Tillim wrote to Dr. Kache:

> Mr. Cochrane came in today and I was surprised to see that there is some improvement in motor function in the posterior tibial muscles. He exhibits more strength in plantar flexion that he had at the last visit. His hamstrings also seem to be getting stronger. There is atrophy in his leg but that appears to be old and related to the injury. There is no further progression of the atrophy.
>
> I had expected to recommend surgery but with the improvement, I feel we should continue to observe him. I doubt that we will be able to improve his pain syndrome

> with surgical treatment. He has not responded to the TENS unit. There are very few choices left to use to treat his painful neuropathy.

[R. 116]. Dr. Tillim asked Plaintiff to continue the pain medications and to make an appointment for another EMG.

On April 9, 1995, Plaintiff was seen and treated in a hospital emergency room for an inversion injury to his right ankle incurred while he was riding a bicycle . [R. 128-130]. His follow up care for this injury was given by E.A. Felmlee, D.O. [R. 144-145].

On July 25, 1995, Plaintiff was examined by Dr. Felmlee for a vocational rehabilitation evaluation. [R. 142-143]. At that time, Plaintiff complained of pain in his left thigh with numbness in the bottom of his left foot and tingling in his lower leg. Dr. Felmlee reported that Plaintiff walked with a slight limp, his left calf and upper leg measured smaller than the right and that reflexes of the Achilles and plantar were absent. He wrote:

> I recommend Vocational Rehabilitation with restriction of heavy lifting or walking for long periods of time. He can stand on his feet, however, for 6 hours a day without any trouble and a little relief every once in a while.

[R. 142]. The doctor noted that one fragment of the bullet which irritated a little bit could be removed surgically on an outpatient basis if the condition worsened. *Id.*

From these medical records, the ALJ made his assessment of Plaintiff's residual functional capacity (RFC). The ALJ determined that Plaintiff has the ability to perform a full range of light work. [R. 16]. He also determined that Plaintiff is able to do

sedentary work. *Id.* Consistent with the medical evidence, and also considered by the ALJ in the RFC determination, was Plaintiff's testimony that he was able to lift up to 30 pounds, [R. 166], that he agreed with Dr. Felmlee's recommendation, [R. 167], and that he was able to do his light duty work as a janitor while his co-workers did the heavy work, [R. 169-172]. Support for the ALJ's RFC determination is also found in the record in a written statement by Plaintiff's former employer who reported that Plaintiff "always did a good job" performing his light duty work as a "general cleaner." [R. 147-148]. Contrary to Plaintiff's assertions, the ALJ pointed specifically to this evidence in determining Plaintiff's RFC and in concluding that he could perform the full range of light work.

Plaintiff claims the record supports his contention that he is unable to perform even the restricted activities required of light work. He points to the November 10, 1994 report of Dr. D'Allesandro and the December 1994 note of Dr. Tillim as medical evidence that supports his contention. [Plaintiff's Brief, p. 3]. The Court notes that Dr. D'Allesandro's report was written just three months after Plaintiff's gunshot injury while he was still using crutches to ambulate and was still receiving therapy. [R. 103-105]. Within eight months after the injury, and by the time of the hearing in May 1996, Plaintiff was no longer using crutches or any assistive device to walk. [R. 177, 183]. Dr. Tillim's report, dated December 8, 1994, was also written shortly after the initial injury and, even so, documented improvement in motor function, strengthening of muscles and no further progression of atrophy. [R. 116]. Plaintiff points to no medical evidence that conflicts with Dr. Felmlee's August 1995 recommendation that

Plaintiff undergo vocational rehabilitation and comment that Plaintiff could stand for 6 hours a day.

Plaintiff alleged inability to work due to pain, numbness and tingling in his legs and weakness. [Plaintiff's Brief, p. 1]. Plaintiff testified at the hearing that, on a scale of one to ten, the pain in his leg and foot averaged between a five and six and, at its "absolute worst" it's "probably an eight or nine maybe." [R. 176]. The ALJ determined that Plaintiff's allegations of debilitating pain are not credible based upon the medical evidence, which he discussed at length and compared with Plaintiff's claims of debilitating pain, noting in particular that the reason Plaintiff was terminated from his janitorial job after his gunshot injury was for reasons other than inability to perform the job, [R. 148 (letter from manager stating Plaintiff was separated from his position because of illegal use of customer phone)], and that he had been academically suspended from school, [R. 162 (Plaintiff's testimony that he was carrying half as many classes because he had starting working); R. 182-183 (Testimony that he "flunked" because he missed the final exams)]. The ALJ also noted that no surgery had been recommended by Plaintiff's physicians, Plaintiff takes no medication and has received no medical treatment since July 1995. [R. 19]. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990).

Plaintiff's claim of depression was asserted for the first time at the hearing on May 8, 1996. [R. 177-178]. He claims that, because the Commissioner did not refer the claim to a psychiatrist or psychologist for review, 42 U.S.C. § 421(h) was violated. That statute requires the Commissioner to make every reasonable effort to ensure that a qualified psychiatrist or psychologist assesses the claimant's mental RFC. However, the Commissioner's regulations interpreting the statute allow an ALJ to complete a PRT form without the assistance of a medical advisor, see 20 C.F.R. § 404.1520a(d)(1)(i). Plaintiff contends that *Andrade v. Secretary of Health and Human Services*, 985 F.2d 1045 (10th Cir. 1993) required the ALJ to obtain professional assistance in completing the PRT form. In *Andrade*, the Tenth Circuit held that, where the ALJ's conclusions regarding the extent of the claimant's mental impairment were unsupported by substantial evidence, the ALJ also erred by assessing the claimant's RFC without making any effort to obtain the assistance of a mental health professional. See *id.* at 1050. In this case, where the ALJ's determination concerning Plaintiff's mental condition is supported by substantial evidence, and the record lacks any evidence seriously challenging the ALJ's assessment of his mental RFC, it was not improper for the ALJ to complete the form himself. See *Bernal v. Bowen*, 851 F.2d 297, 302-03 (10th Cir. 1988). In order to establish a disabling mental impairment, Plaintiff must provide evidence to establish marked or frequent functional limitations in at least two of the behavior signs set forth in 20 C.F.R. 404, Subpt. P, App. 1, 12.04. Apart from a diagnosis without discussion by Dr. Kache in the Discharge Summary on September 27, 1994 and a note by Dr. D'Allesandro that Plaintiff

reported difficulty in sleeping, nervousness and depression, there is no evidence that Plaintiff complained of or was treated for depression. [R. 51]. The ALJ concluded, and the Court agrees, that the evidence does not support a finding of disability based upon depression.

The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of depression and pain in accordance with the correct legal standards established by the Commissioner and the courts.

Plaintiff's Second Statement of Error

Plaintiff contends the ALJ's use of the "Grids" was error. The ALJ relied on the Medical-Vocational Guidelines ("Grids"), 20 C.F.R., Pt. 404, Subpt. P, App. 2, Table No. 2, Rule 202.15, to support his determination that Plaintiff is not disabled. Plaintiff claims that his RFC does not meet the definition of one the exertional ranges and that the ALJ was required to consider the extent of any erosion of the occupational base which precludes reliance upon the grids. [Plf's Brief, p. 4]. The ALJ may apply the grids without relying on vocational testimony if the ALJ determines the claimant has no significant impairments affecting his RFC. See *Evans v. Chater*, 55 F.3d 530, 532 (10th Cir. 1995); see also *Thompson v. Sullivan*, 987 F.2d 1482, 1488 (10th Cir. 1993) (mere presence of nonexertional impairment does not preclude reliance on grids if nonexertional impairment would not impair claimant's ability to work). As discussed

above, the ALJ properly found that Plaintiff could perform the full range of light and sedentary work. Therefore, there was no error in applying the grids to find that he is not disabled. *Thompson v. Sullivan*, 987 F.2d 1482 (10th Cir. 1993).

Plaintiff's Third Statement of Error

Finally, Plaintiff asserts the ALJ's findings regarding his depression are incomplete. He argues that the ALJ failed in his duty to develop the record concerning his mental impairment. [Plaintiff's Brief, p. 5]. Plaintiff does not state what the ALJ might have done, other than arguing that a psychiatrist or psychologist should have reviewed the medical portion of the claim, in order to ensure a "completely developed record." As discussed above, given the absence of a substantial issue concerning Plaintiff's mental impairment, the ALJ acted within his discretion in considering the evidence regarding Plaintiff's mental claim and entering his decision accordingly.

Plaintiff asserts the ALJ erred "in that the Plaintiff was not examined by a mental health professional." [Plaintiff's brief, p. 5]. The Court interprets this as an allegation that the Commissioner was required to order a consultative medical examination. "[T]he ALJ should order a consultative exam when evidence in the record establishes the reasonable possibility of the existence of a disability and the result of the consultative exam could reasonably be expected to be of material assistance in resolving the issue of disability." *Hawkins v. Chater*, 113 F.3d 1162, 1169 (10th Cir. 1997) In this case, the record contains no evidence to suggest that a consultative examination would have produced material information. There is no direct conflict in the medical evidence requiring resolution; the medical evidence in the

record is not inconclusive; and additional tests are not required to explain a diagnosis already contained in the record. *See Id. at* 1166. The Court finds that the ALJ did not err in failing to order a consultative examination.

Conclusion

The Court finds the ALJ's determination that Plaintiff retained the capacity to do the full range of light work was based on the record as a whole, including the records and reports of Plaintiff's treating physicians, examining and consulting physicians, objective medical findings and the testimony of Plaintiff. The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 30th day of Oct., 1998.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBORAH NORMAN,
SSN: 448-64-2751,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 97-CV-955-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 29th day of Oct., 1998.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

(14)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBORAH NORMAN,
448-64-2751

Plaintiff,

vs.

Case No. 97-CV-955-M

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

ORDER

Plaintiff, Deborah Norman, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less

[1] Plaintiff's August 18, 1992, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held March 7, 1996. By decision dated March 20, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on August 22, 1997. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

(13)

than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.,* 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services,* 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born November 27, 1956, and was 39 years old at the time of the hearing. She has a high school education and a bachelor's degree. She formerly worked as a nurses' aide, real estate leasing agent, electronics recruiter, employment agency agent, clerical office worker, and child care worker. She claims to have been unable to work since April 10, 1992, as a result of her mental condition. The ALJ reviewed the evidence and reopened Plaintiff's July 24, 1992, application which was denied January 5, 1993. He found that Plaintiff was disabled commencing April 10, 1992, and ending September 21, 1993. Since September 21, 1993, the ALJ found Plaintiff able to perform light and sedentary work subject to only simple repetitive jobs requiring little concentration and little attention to details at a minimal stress level. Based on the testimony of a vocational expert, the ALJ found that although Plaintiff could not perform her past relevant work, there exist jobs in the regional and national

economy Plaintiff was capable of performing after September 21, 1993. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to apply the medical improvement standard to his decision concerning the ending date of her disability (2) failed to accord appropriate weight to her treating physicians' opinions that she meets a Listing; (3) failed to develop the record; and (4) ignored vocational expert testimony.

The record reflects that Plaintiff was committed to a psychiatric hospital in Iowa for treatment on April 10, 1992, and received inpatient treatment until May 25, 1992. At the time she was committed Plaintiff was displaying mood swings, grandiose ideation and disruptive behavior. [R. 155]. She was diagnosed with a schizoaffective disorder, manic type. [R. 163]. She returned to Oklahoma from Iowa. On June 29, 1992, she presented to the Parkside emergency room with suicidal ideation and fearing she would go crazy. She was diagnosed as having a bipolar disorder. [Dkt. 172]. The record reflects Plaintiff received outpatient therapy and treatment for her bipolar disorder and depression at Family Mental Health Center ("FMHC") and Associated Centers for Therapy, Inc. ("ACT").

The FMHC medical records reflect Plaintiff's frequent complaints of sleep problems, illogical thoughts, suicidal ideation, preoccupation with death and dying,

poor insight, and poor grooming. [R. 214-225]. By June 1, 1993, the treatment notes reflect that Plaintiff's grooming had improved, she was less depressed, and not suicidal. [R. 213]. On September 21, 1993, Dr. Luc recorded that Plaintiff denied any current symptoms and found her to be stable. [R. 211]. On October 11, 1993, Dr. Luc found that although Plaintiff was off most of her medications, she was without mood symptoms. [R. 210]. Dr. Luc's records indicate that her status was unchanged throughout the remainder of the time he treated Plaintiff. [R. 196; 199-100; 209-10]. On September 26, 1994, Dr. Luc noted that Plaintiff's sleep problem and depression was largely resolved. [R. 199]. Her therapist's notes reflect that Plaintiff's had ups and downs with her sleep patterns and depression throughout her treatment at FMHC.

Beginning in November 1995 Plaintiff transferred her treatment to ACT. There her therapist also recorded Plaintiff's ups and downs but noted that she had good insight and that structure would increase stability. [R. 276]. At ACT Plaintiff's therapist and her doctor both recorded that she was stable. [R. 265-270; 272].

On the basis of the medical records the ALJ found that Plaintiff's condition had stabilized by September 21, 1993, when she discontinued her medication. After discontinuing her medication she remained in a stable condition, and there is no evidence that she is not presently stable. [R. 18]. The ALJ concluded that although Plaintiff was not capable of performing work-related activities due to her mental condition prior to September, 21, 1993, the records indicate that she could perform work after September 21, 1993.

Plaintiff asserts that the ALJ should have applied the benefit termination standard set out in 20 C.F.R. §§ 404.1594 and 416.994 which require the ALJ to perform an eight-step evaluation and to point to specific evidence of medical improvement. According to Plaintiff, failure to do so was reversible error. Plaintiff does not cite any case authority to support this assertion.

The Tenth Circuit has not, in a published opinion, directly addressed whether the so-called medical improvement standard of 20 C.F.R. §§ 404.1594 and 416.994 applies to closed period of disability cases, such as this one. However, there are Tenth Circuit opinions which address the proper use of the medical improvement standards. In *Brown v. Sullivan*, 912 F.2d 1194 (10th Cir. 1990) Plaintiff was awarded benefits in 1972 which were terminated in 1982. The termination was not appealed. Denial of Plaintiff's subsequent application for benefits was appealed. The Tenth Circuit rejected Plaintiff's assertion that the medical improvement standard, rather than the standard for new disability claims, applied to his case. The Court, citing *Richardson v. Bowen*, 807 F.2d 444, 445-46 (5th Cir. 1987), stated "the medical improvement standard applies only in termination cases, not in later applications." *Brown*, 912 F.2d at 1196 [emphasis supplied]. In *Richardson*, the Fifth Circuit determined that the medical improvement standard applies only to termination cases, not new applications.

The instant case is not a benefit termination. A termination case is one in which there has been a previous decision in favor of disability, followed by receipt of benefits, and further followed by a new proceeding resulting in cessation of benefits.

This case is concerned with a new application for benefits, only. The distinction between these situations is well recognized. See *Glen v. Shalala*, 21 F.3d 983, 987 n.1 (10th Cir. 1994) (cases concerning initial benefit determinations not persuasive in termination of benefits case); *Camp v. Heckler*, 780 F.2d 721, 721-22 (8th Cir. 1986) (medical improvement not applicable to closed period); *Taylor v. Heckler*, 769 F.2d 201, 202 (4th Cir. 1985) (distinguishing between termination of currently received benefits and determination of discrete period of disability). Despite the ALJ's determination that Plaintiff was disabled for a while, this case is not a termination case and the medical improvement standards applicable only to termination cases do not apply. See *Ness v. Sullivan*, 904 F.2d 432 (8th Cir. 1990); *Brown v. Chater*, 1995 WL 625915 (10th Cir. (Okl.)). The Court therefore rejects the ALJ's failure to comply with 20 C.F.R. §§ 404.1594 and 416.994 as a basis for reversal.

The record contains letters written by Plaintiff's treating physicians, Dr. Luc and Dr. Karns. Dr. Luc's letter, dated March 28, 1995, states that she meets the specific criteria of anhedonia, sleep disturbance, decreased energy, and difficulty concentrating listed in §12.04 of the Social Security Regulations No. 4, Appendix I, Subpart P. Section 12.04 is one of the Listing of Impairments found in the Social Security Regulations. Dr. Karns' letter dated February 27, 1996, states: "I have reviewed our medical records on Ms. Deborah Norman, and Social Security Regulations No. 4, Appendix I, Subpart P and find that Ms. Norman's condition is consistent with the criteria stated." [R. 264]. Plaintiff argues that the ALJ failed to give the letters written by these doctors substantial weight.

The ALJ referred to the letters in his decision, but discounted them as appearing to have been signed by someone who had not treated Plaintiff. [R. 16]. The ALJ's statement concerning these letters is not accurate. The letters were clearly signed by the same physicians whose office notes appear in the record. It is well established that the Commissioner must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. However, good cause must be given for rejecting the treating physician's views and, if the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ, *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); *Byron v. Heckler*, 742 F.2d 1232, (10th Cir. 1984). The ALJ did not appreciate that the letters were signed by Plaintiff's treating physicians. In fact, he rejected their conclusions because he wrongly thought they were written by someone who had not treated Plaintiff. Consequently, the denial decision does not contain the required discussion of the reasons for rejecting the physicians' opinions. The decision must therefore be reversed and the case remanded for further evaluation of the treating physicians' opinions.

Plaintiff's remaining contentions that the ALJ failed to develop the record and ignored vocational expert testimony are without merit. In remanding this case, the Court does not dictate the result, nor does it suggest that the record is insufficient.

Rather, remand is ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based upon the facts of the case. *Kepler,* at 391.

SO ORDERED this 29th Day of October, 1998.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY E. GREGORY,
SSN: 444-56-4968,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 97-CV-1119-M

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 30th day of Oct., 1998.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

(10)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY E. GREGORY,
444-56-4968

Plaintiff,

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-1119-M

ORDER

Plaintiff, Gary E. Gregory, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less

[1] Plaintiff's June 8, 1992, (protectively filed) and July 31, 1992, applications for disability benefits were denied which denials were affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held May 5, 1997. By decision dated May 30, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on October 17, 1997. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services,* 961 F.2d 1495 (10th Cir. 1992). Applying this standard, the Court affirms the Commissioner's denial of benefits.

Plaintiff was born August 22, 1953, and was 43 years old at the time of the hearing. He has a General Equivalency Diploma, and formerly worked as a machinist, truck driver, station attendant, and cement finisher. He claims to have been unable to work between July 1, 1989, and December 6, 1995, as a result of torn muscles in his back, seizures, and arthritis in his right knee. The ALJ determined that although Plaintiff was unable to perform his past relevant work, he was capable of performing light work reduced by: no repetitive pushing or pulling of leg controls with right leg; balancing; climbing of ladders, ropes, or scaffolds; work performed at unprotected heights or uneven surfaces; more than occasional climbing of ramps or stairs; more than occasional work around hazardous machinery; more than occasional exposure to dust, fumes, or gases; more than infrequent crouching, kneeling, or crawling; or more than infrequent exposure to marked temperature extremes (cold). Based on the

of a vocational expert, the ALJ determined that there are a significant number of light and sedentary jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff states that the case was "previously remanded because the previous ALJ failed to properly consider the limitations imposed by severe arthritis of the knee and failed to consider the side effects of the medication Mr. Gregory took to control seizures."[2] [Dkt. 5, p. 1]. He asserts that the time period under consideration is between June 1989, and December 1995, and claims that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to accord proper weight to the opinions of Drs. Peterson and Milo who stated Plaintiff was limited to sedentary work and (2) failed to consider the sedation caused by Plaintiff's seizure medication, Dilantin.

The current application for benefits is Plaintiff's third one alleging disability since 1989. Plaintiff filed an application for benefits in March 1990, which was denied in May 1990 on reconsideration and not appealed further. He filed another application in April 1991, which was also denied at the reconsideration level on October 25, 1991, and not appealed further. In considering the current application, the ALJ

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[2] Plaintiff's statement is not entirely accurate. The case was previously remanded because the reviewing court determined that the ALJ had not made sufficient inquiry of Plaintiff, who was not represented at the hearing. The case was remanded to require the ALJ to further develop the record during a supplemental hearing and to re-examine the evidence in light of that evidence. [R. 476-481].

acknowledged the 1991 denial and expressly stated he did not find any reason to reopen. He stated that he reviewed the medical evidence related to the earlier application to assist him in determining a base of condition from which he could draw conclusions concerning whether Plaintiff's condition had improved or deteriorated and expressly denied that such review constituted a de facto reopening. [R. 444].

The law is well-established: federal courts have no jurisdiction to review the refusal to reopen Plaintiff's previous claims for disability benefits. *See Califano v. Sanders*, 430 U.S. 99, 107-08, 97 S.Ct. 980, 985-86, 51 L.Ed.2d 192 (1977). The decision not to reopen a previously adjudicated claim for benefits is not a final decision reviewable under 42 U.S.C. § 405(g). *Brown v. Sullivan*, 912 F.2d 1194, 1196 (10th Cir. 1990). An exception exists where the denial of a petition to reopen a claim is challenged on constitutional grounds. *Califano v. Sanders*, 97 S.Ct. at 986. Since Plaintiff has not alleged a constitutional basis to review the decision not to reopen his previous claim, the Court is without jurisdiction to review his claim for benefits prior to the October 25, 1991, denial. Therefore, the Court finds October 26, 1991, the day after the previous denial to be the appropriate beginning date for the time-frame under consideration.

The medical evidence establishes that between October 1991 and the date he returned to work, Plaintiff received treatment for right knee problems and for a seizure disorder. The seizure disorder was controlled with the medication Dilantin. Plaintiff underwent knee surgery on August 21, 1992, September 22, 1992, and August 17, 1995.

The Court finds that the ALJ properly considered the opinions of Plaintiff's treating physicians, Doctors Milo, Peterson, and Sikka. On May 5, 1993, Dr. Sikka recommended that Plaintiff do general conditioning exercises and walking. He noted "patient may resume all activities of daily living and all kind of light duty work or any kind of schooling." [R. 501]. In June of 1993 Dr. Sikka reiterated his opinion that Plaintiff could do "any type of vocational or activity of daily living and schooling." [R. 498]. On January 12, 1995, Dr. Peterson stated that Plaintiff is "not a candidate for any type of job requiring prolonged standing, climbing or lifting, but should be classified as a sedentary type worker." [R. 533-34]. On March 24, 1995, Dr. Sikka stated: "Patient can go to school or do any kind of vocational retraining." [R. 496]. On August 23, 1995, just after Plaintiff's August 17th surgery, Dr. Milo noted that Plaintiff is limited to "only sedentary work with adequate support and presence of other people should be considered." [R. 492]. The limitations the ALJ placed on Plaintiff's RFC, including the need to alternate sitting and standing at least once every half hour take into account the opinions of Plaintiff's physicians. Furthermore, some of the representative jobs within Plaintiff's RFC are sedentary ones. [R. 453].

Plaintiff states that the ALJ erred by failing to accord any limitations to the side effects of his seizure medication. The ALJ noted Plaintiff's testimony that Dilantin slowed him down, making him sleepy. However, since the medical evidence does not contain a record of Plaintiff having complained to his treating physicians of this side-effect, the ALJ discounted the credibility of his testimony. [R. 450]. The Commissioner is entitled to examine the medical record and to evaluate a claimant's

credibility. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The Court has reviewed the medical record, and notes only one instance where Plaintiff complained of Dilantin side effects. In June, 1991, Dr. Wolfe recorded that Plaintiff felt he was adversely affected by Dilantin. A week later the doctor recorded that he was weaning off Dilantin and felt better. [R. 324]. Later records reflect that Plaintiff was still taking Dilantin in September 1992, with no complaints. [R. 362]. The Court finds that the ALJ's conclusion concerning the side effects of Dilantin are supported by substantial evidence.

The Court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The Court further finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED this 30th Day of October, 1998.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LLOYD H. ALEXANDER,
SSN: 440-68-1231

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-CV-801-J

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 30th day of October 1998.

Sam A. Joyner
United States Magistrate Judge

1/ On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LLOYD H. ALEXANDER,
SSN: 440-68-1231

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-CV-801-J

ORDER[2/]

Plaintiff, Lloyd H. Alexander, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff asserts that the Commissioner erred because (1) the ALJ's findings with regard to Plaintiff's residual functional capacity ("RFC") were not based on substantial evidence, (2) the ALJ's credibility findings are not based on substantial evidence, and (3) the ALJ relied

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1/ On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

2/ This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

3/ Plaintiff was initially found not disabled based on Step Two. [R. at 11]. The decision of the Commissioner was reversed and remanded by the District Court. By decision dated May 30, 1996, Administrative Law Judge R.J. Payne (hereafter "ALJ") concluded that Plaintiff was not disabled at Step Five of the sequential evaluation. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on June 27, 1997. [R. at 181]. Plaintiff has appealed this decision to the District Court.

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on improper vocational testimony. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born February 24, 1960. [R. at 245]. At his hearing before the ALJ on January 5, 1994,[4/] Plaintiff testified that he graduated high school, and was, at the time of the hearing, 33 years old. [R. at 33]. Plaintiff stated that he drove to the hearing. According to Plaintiff, he was unable to bend or lift because of the pain in his lower back. Plaintiff additionally testified that he experienced numbness in his hands and fingers, memory problems, and pain. Plaintiff believed that he could sit for approximately one hour, walk for approximately 45 minutes, lift 40 pounds (infrequently) and 20 pounds frequently. [R. at 49].

A social security examiner examined Plaintiff on April 16, 1998. He noted that Plaintiff gave vague descriptions of why he could not work and that his symptoms were vague. [R. at 143]. The examiner additionally indicated that Plaintiff provided inconsistent information to him.

Plaintiff was examined on April 22, 1993 by a social security examiner. The examiner noted Plaintiff's gait was normal and that Plaintiff showed no muscle atrophy or paralysis. The examiner indicated that Plaintiff's finger dexterity and gross and fine manipulation was fine. [R. at 149]. The doctor concluded that medium or heavy work would be difficult for Plaintiff to perform. [R. at 151].

[4/] This hearing was prior to Plaintiff's initial denial of benefits at Step Two. Following remand by this Court, the ALJ conducted a second hearing at which Plaintiff testified.

Plaintiff was examined November 15, 1995. [R. at 245]. The examiner noted that he could detect no objective neurological deficits, and his impression was "chronic cervical and lumbosacral strain." [R. at 246]. He concluded that Plaintiff could sit a total of eight hours in an eight hour day, stand a total of three hours in an eight hour day, and walk a total of two hours in an eight hour day. [R. at 247]. The examiner indicated that Plaintiff could sit for three hours at one time, stand for one hour at a time, and walk for one hour. [R. at 247]. In addition, the examiner indicated Plaintiff could frequently lift 21 - 25 pounds, occasionally lift 26 - 50 pounds, and infrequently lift 51 - 100 pounds. [R. at 247].

Plaintiff testified at a second hearing before the ALJ on April 4, 1996. [R. at 256]. Plaintiff stated that he was unable to work due to unbearable pain. [R. at 264]. Plaintiff additionally noted that he experienced headaches, sometimes lasting for thirty minutes to one hour. [R. at 265]. Plaintiff stated he had numbness in his hands, difficulty with his memory, and that he sometimes heard voices. [R. at 265-270]. According to Plaintiff, he could stand for approximately 45 minutes to one hour, lift approximately 10 - 20 pounds, walk approximately 45 minutes to one hour, and sit approximately 30 to 40 minutes. [R. at 274].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). The Commissioner has established a five-step process for the evaluation of social security claims.[5/] See 20 C.F.R. § 404.1520.

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of

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[5/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[6/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

6/ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff's impairments limited Plaintiff to light work activity which did not require standing for more than one hour at a time or more than three hours in an eight hour workday; walking for more than one hour at a time or for more than two hours during an eight hour work day; no repetitive pushing or pulling of arm or leg controls or overhead repetitive reaching or more than occasional stooping, crouching, bending, or climbing stairs. The ALJ also noted that if an individual can perform light work the individual can generally perform sedentary work. [R. at 194]. Based on the testimony of a vocational expert the ALJ concluded that Plaintiff was not disabled.

IV. REVIEW

RESIDUAL FUNCTIONAL CAPACITY

Plaintiff states that he is disabled because he has a chronic cervical and lumbosacral strain. Plaintiff initially asserts that the ALJ's conclusion that he had the RFC to perform the standing and exertional requirements of light work is not supported by the record. Plaintiff additionally states that the ALJ's findings conflict with the findings of Michael Karathanos, M.D.

Plaintiff does not fully develop or further explain his argument. Dr. Karathanos, as noted by Plaintiff, indicated that Plaintiff could sit three hours at one time and eight hours total (in an eight hour day), stand one hour at a time and three hours total, and walk one hour at a time and two hours total. Dr. Karathanos further indicated that Plaintiff could frequently lift 21 - 25 pounds. These are the exact limitations which

the ALJ placed upon Plaintiff. [R. at 194]. The ALJ does note that Plaintiff can perform "light work activity," but the ALJ further expands the Plaintiff's RFC to include the limitations placed upon Plaintiff by Dr. Karathanos. Plaintiff does not further explain or develop his argument that the ALJ's conclusions were incorrect. The Court concludes that the ALJ's findings are supported by substantial evidence.

Plaintiff additionally asserts that no evidence supports the finding of the ALJ that Plaintiff can walk for six hours out of an eight hour day. The ALJ did not make this finding. The ALJ did conclude that Plaintiff could, generally, perform light work. Light work is defined as requiring "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. . . ." 20 C.F.R. § 404.1567(b) (emphasis added). However, the ALJ added an additional restriction to his general "light work" RFC. The ALJ noted that Plaintiff could walk for no more than one hour at a time or for no more than a total of two hours during an eight hour work day. This finding, as Plaintiff notes, is supported by the examination of Dr. Michael Karathanos. Plaintiff does not further explain why the ALJ's RFC is inappropriate or not supported by substantial evidence.

CREDIBILITY ANALYSIS

Plaintiff states that the ALJ is required to examine all of the evidence in evaluating a Plaintiff's credibility. Plaintiff asserts that a credibility finding is not dispositive at Step Five and that an ALJ must "point to specific evidence to establish that, despite Plaintiff's nonexertional impairments, that he could still perform the light jobs found by the ALJ." Plaintiff's Brief at 3. Plaintiff refers to the factors which the courts have outlined should be followed in evaluating a claimant's credibility and states that the ALJ "failed to properly link his conclusory findings regarding Plaintiff's credibility to the evidence." Plaintiff's Brief at 4.

In Kepler v. Chater, 68 F.3d 387, (10th Cir. 1995), the Tenth Circuit determined that an ALJ must discuss a Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions. Id. at 390-91.

> Though the ALJ listed some of these [Luna] factors, he did not explain why the specific evidence relevant to each factor led him to conclude claimant's subjective complaints were not credible.

Id. at 391. The Court specifically noted that the ALJ should consider such factors as:

> the levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Id. at 391. The Tenth Circuit remanded the case, requiring the Secretary to make "express findings in accordance with Luna, with reference to relevant evidence as appropriate, concerning claimant's claim of disabling pain." Id. at 10.

An ALJ's determination of credibility is given great deference by the reviewing court. See Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). On appeal, the court's role is to verify whether substantial evidence in the record supports the ALJ's decision, and not to substitute the court's judgment for that of the ALJ. Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995) ("Credibility determinations are peculiarly within the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence."); Musgrave v. Sullivan, 966 F.2d 1371, 1374 (10th Cir. 1992).

Plaintiff does not specify how the ALJ erred in evaluating Plaintiff's credibility or what factors the ALJ improperly failed to consider. In this case, the ALJ initially reviewed the medical evidence and noted that Plaintiff's complaints of pain have consistently been vague. The ALJ referred to specific medical records. The ALJ noted that Plaintiff stated his right index finger was amputated when the tip of his finger was amputated. [R. at 196]. The ALJ observed that Plaintiff claimed he heard things and passed out at times, but that the doctor noted Plaintiff was unable to accurately describe his passing out, and that Plaintiff had not mentioned hearing things to any of his physicians. The ALJ additionally noted that the medical record indicated significant periods of time during which Plaintiff did not seek treatment.

The ALJ observed inconsistencies in Plaintiff's testimony. The ALJ noted that Plaintiff stated he could not walk due to his severe pain, but later testified he could walk or stand for 45 minutes to one hour. The ALJ noted that Plaintiff testified that he had no grip strength and that his hands were numb, but that Plaintiff additionally stated he drove a car, could lift 20 pounds, and cooked each day. The ALJ observed that Plaintiff testified he could sit for only 30 to 40 minutes, but that the hearing before the ALJ lasted one hour and 15 minutes and Plaintiff exhibited no discomfort.

The ALJ observed that although Plaintiff indicated he had trouble sleeping and headaches, the record contained only one mention of headaches and Plaintiff reported to his doctors that he was sleeping better. The ALJ additionally observed that although Plaintiff claimed he experienced numbness in his hands he had never mentioned the numbness to a treating physician.

The ALJ noted that Plaintiff was treated at Morton health services which the ALJ described as a public facility. The ALJ observed that Plaintiff claimed the reason he had not sought additional medical care was because he could not afford it. The ALJ found Plaintiff's statement inconsistent with the previous services Plaintiff had sought.

The ALJ devoted over two single-spaced pages to an analysis of Plaintiff's credibility and his complaints of pain. Plaintiff does not specify the exact manner in which the ALJ erred other than refer to general requirements that the ALJ must evaluate credibility and "link" findings to the evidence. This Court is at a loss as to what more the ALJ could have done in evaluating Plaintiff's credibility. The Court

concludes that the findings of the ALJ as to Plaintiff's credibility are supported by substantial evidence.

VOCATIONAL EXPERT

Plaintiff asserts that the ALJ relied on erroneous testimony from the vocational expert. Plaintiff states that he cannot perform the jobs of "gate tender" or "telephone solicitor" because those jobs are "SVP 3" jobs which are semi-skilled. Plaintiff asserts that the evidence does not indicate that Plaintiff has skills which are transferrable to the jobs described. Plaintiff refers to Social Security Ruling 82-41. Plaintiff notes that the vocational expert merely concluded that an individual with a high school education could perform SVP 3 work, but that the vocational expert could not explain this reasoning.

In the Dictionary of Occupational Titles ("DOT"), SVP stands for "specific vocational preparation." Each job in the DOT contains a number which equates to the amount of vocational preparation time that is necessary for the performance of the job. The DOT additionally notes that the vocational preparation can include special vocational training, on the job training, vocational education, apprenticeship, in-plant training, or experience in other jobs. See Dictionary of Occupational Titles, at 1009 (4th ed. 1991) (emphasis added).

The DOT also provides an SVP scale. An SVP of "three" indicates that a job requires more than one month and up to three months of training. In addition, this time "does not include the orientation time required of a fully qualified worker to

become accustomed to the special conditions of any new job." See Dictionary of Occupational Titles, at 1009 (4th ed. 1991).

The social security regulations provide that the administration takes "administrative notice" of "reliable job information available from various governmental and other publications . . . [including] the Dictionary of Occupational Titles." 20 C.F.R. § 404.1566(d). However, as becomes evident from a comparison of the DOT and the social security regulations, the two are not an exact match.[7/] The social security regulations define "unskilled work" as "work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength . . . and a person can usually learn to do the job in 30 days, and little specific vocational preparation and judgment are needed." 20 C.F.R. 404.1569(a) (emphasis added). No specific "time guidelines" are provided for semi-skilled work or skilled work.

The definition in the regulations for unskilled work, which can include on the job training usually learned within 30 days, is not in direct and obvious conflict with an SVP rating of three, which can include on the job training of one month to three months. Therefore, under the regulations, an SVP 3 may include "unskilled" work. In addition, as noted by Defendant, the regulations differentiate between "skills" and "transferability" of skills. Plaintiff focuses solely on transferability. Regardless, the

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[7/] The DOT also notes that "[o]ccupational definitions in the DOT are written to reflect the most typical characteristics of a job as it occurs in the American economy. Task element statements in the definitions may not always coincide with the way work is performed in particular establishments or localities." See Dictionary of Occupational Titles, at 1009 (4th ed. 1991).

vocational expert identified additional jobs which the expert stated Plaintiff could perform.

Plaintiff additionally asserts that the other jobs of marker and glass waxer should not be considered because the vocational expert witness testified that Plaintiff could not perform those jobs if Plaintiff's testimony was credible.

However, an ALJ need include only those limitations in the question to the vocational expert which he properly finds are established by the evidence. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995).Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). In this case, the Court concludes that the hypothetical question presented to the vocational expert adequately included Plaintiff's limitations.

The ALJ concluded that Plaintiff could work as a gate tender or security guard which are skill level three jobs, or semiskilled (2,844 in Oklahoma) As noted above, Plaintiff asserts that the Court should ignore the jobs of gate tender or security guard. However, even if those jobs are not considered, the vocational expert concluded that Plaintiff could work as a hand packager (1,098 jobs in Oklahoma and 192,339 in the United States) waxer (325 in Oklahoma and 11,811 in the United States). Plaintiff presents no other argument to the Court as to why these jobs should be rejected.[8/]

8/ Plaintiff does not argue that the number of jobs which the vocational expert testified that Plaintiff could perform is not sufficient. See Trimiar v. Sullivan, 966 F.2d 1326, 1330 (10th Cir. 1992) (refusing to draw a bright line, but indicating the criteria for consideration in determining whether a significant number of jobs is present). See also Lee v. Sullivan, 988 F.2d 789, 793 (7th Cir. 1992) (summarizing the various positions of the circuits: Sixth Circuit found 1,350 positions significant; Ninth Circuit found 1,266 positions significant; Tenth Circuit found 850-1,000 potential jobs significant; Eighth Circuit found 500 jobs significant; Eleventh found 174 positions significant).

Accordingly, the Commissioner's decision is **AFFIRMED.**

Dated this 30 day of October 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

REGINALD CHARLES HORNER,)
)
Plaintiff,)
)
vs.) Case No. 97-CV-1103
)
INCOME PRODUCING MANAGEMENT)
OF OKLAHOMA, INC.,)
)
Defendant.)

ORDER

This matter came on before the Court for hearing on October 27, 1998, on defendant's motion for summary judgment. Plaintiff brings this action under Title VII of the 1964 Civil Rights Act, as amended, Title 42, United States Code, Section 2000e and the Americans With Disabilities Act of 1990, Title 42, United States Code, Section 12112(a) asserting claims of discrimination due to his physical limitations and pendent state law claims for Intentional and Negligent Infliction of Emotional Distress. The following material facts are undisputed, and have been stipulated to by the parties at the hearing held on October 27, 1998.

1. Defendant, Income Producing Management of Oklahoma, Inc. owns the Wendy's franchises in the Tulsa area.

2. On September 17, 1996, plaintiff Reginald Horner began his employment with Wendy's at the 11th and Harvard location as a grill cook.

3. Plaintiff contends that he was constructively discharged by Wendy's on April 14, 1997, due to intolerable harassment because of his speech impediment and because his supervisor would not let him off work in time to take dialysis treatments.

4. Plaintiff's initial supervisor was Rhonda Farley. Ms. Farley was commonly called Rhoda. At his job interview with Rhoda Farley, plaintiff requested restricted work hours so that he could continue to receive disability benefits from the Social Security Administration and so he could take dialysis treatments three days a week at 5:00 p.m. due to his kidney disease.

5. This request was granted by Rhoda Farley and plaintiff was scheduled to be off work by 4:30 p.m. Mondays, Wednesdays, and Fridays so he could take the dialysis treatments at 5:00 p.m.

6. Plaintiff admits that he never missed any dialysis treatments while working at Wendy's.

7. On December 6, 1996, plaintiff states that Rhoda Farley asked him for a "fry count" and when he did not respond promptly due to his speech impediment, plaintiff contends Rhoda made the following statement:

> Reggie, if you don't hurry and tell me the fry count, I will slap you in the mouth with my spatula.

8. On December 9, 1996, plaintiff wrote a letter to Mr. Allen Rowan, the

manager of this Wendy's location. In the letter plaintiff complained of the statement made by Rhoda Farley to him and stated that it had hurt his feelings and it had embarrassed him in front of his co-workers and Wendy's customers.

9. As a result of plaintiff's letter, Mr. Allen Rowan went to the Wendy's location and spoke to both Rhoda Farley and the plaintiff about plaintiff's complaint. Plaintiff admits that Mr. Rowan came to the Wendy's location while he was working and told plaintiff that he had talked to Rhoda Farley about her statement to him and Mr. Rowan had assured him that "it wouldn't happen again." Plaintiff did not make any other complaints to Mr. Rowan about Rhoda Farley prior to plaintiff's resignation.

10. Plaintiff contends that after he complained to Mr. Rowan about Rhoda's comment, that thereafter on occasion Rhoda would not allow him to leave at 4:30 p.m. to take his dialysis treatments. Plaintiff states that he never missed a dialysis treatment but that he was an hour late on one occasion because Rhoda would not let him off work. Plaintiff contends that this conduct by Rhoda was in retaliation for his complaint to Mr. Rowan.

11. In early February, 1997, Rhoda Farley transferred to another Wendy's location.

12. James Baxter became the new supervisor at the Wendy's location in which plaintiff was employed. Baxter was not aware of Farley's statement to plaintiff until

after plaintiff filed suit. Plaintiff worked under Baxter for two months without any complaints.

13. On April 14, 1997, on one occasion, James Baxter asked plaintiff if he could stay and work past his regular shift. When plaintiff refused, plaintiff says that Mr. Baxter stated that he could not let him off the clock because he did not have another grill cook. So plaintiff said he had no choice but to resign because he had to take dialysis treatments. On that date, plaintiff walked off the job complaining that the conditions of employment at Wendy's were intolerable. Plaintiff says that Mr. Baxter did not say anything in response to him when he walked off the job.

14. On April 15, 1997,Wendy's president of human resources, Mr. Roger Bolton, wrote a letter to plaintiff and apologized to him regarding the "misunderstanding" he had with his supervisor, James Baxter, about working later than his regular shift. In the letter, Mr. Bolton offered plaintiff reinstatement, at the same or another Wendy's location. The offer included reinstatement with the same hours or plaintiff could set different hours of work. Plaintiff was also offered to work under the same supervisor, James Baxter, or he could transfer and work under a different supervisor. Mr. Bolton also offered plaintiff full back pay, and benefits with no loss of seniority.

15. Plaintiff did not respond to Wendy's offer of reinstatement and lost wages.

16. Within two weeks after plaintiff left Wendy's, plaintiff was employed by Express Temporaries and was assigned to Bama Pie as a production worker. He worked 48 hours per week at $6.00 per hour. During his employment with Wendy's, plaintiff worked 16 hours per week, at $4.75 per hour. In June 1997, plaintiff became a direct employee of Bama, working 40 hours per week at $8.25 per hour. Plaintiff now earns $8.60 per hour.

17. Neither plaintiff's speech impediment nor his kidney problems precluded plaintiff from working at Wendy's. According to plaintiff's doctor, his kidney problems do not limit plaintiff's major life activities.

The Court finds and concludes that Wendy's apology to plaintiff and offer of reinstatement at the same or another location, with full back pay, benefits and seniority precludes plaintiff's claim for damages under Title VII and the ADA.

Plaintiff's re-employment within two months of resigning at Wendy's with increased pay, mitigates plaintiff's claim for damages.

Additionally, Plaintiff has not shown an "adverse employment action" taken by Wendy's against him, because none of plaintiff's allegations "altered the conditions of his employment." In his deposition, plaintiff claims that the statement made to him by Rhoda Farley "hurt his feelings." Additionally, asking plaintiff to work late with no repercussions for refusing to do so does not give rise to an "adverse employment

action."

Plaintiff's claim of constructive discharge fails because plaintiff has not shown an abusive working environment, that is, that the working conditions were so intolerable that a reasonable person in plaintiff's position would feel forced to resign.

Further, plaintiff has not alleged sufficient facts to set forth a claim of intentional infliction of emotional distress because the conduct alleged by plaintiff is not outrageous nor shocking to the average person.

ACCORDINGLY, IT IS THE ORDER OF THE COURT, that defendant's motion for summary judgment should be and hereby is, GRANTED.

IT IS SO ORDERED this 29th day of October, 1998.

H. DALE COOK
Senior, United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REGINALD CHARLES HORNER)
)
Plaintiff,)
)
vs.) CASE NO. 97-CV-1103
)
)
INCOME PRODUCING MANAGEMENT)
OF OKLAHOMA, INC.)
)
Defendant.)

ENTERED ON DOCKET

DATE NOV 02 1998

JUDGMENT

This matter came before the Court for consideration of the motion for summary judgment filed by the defendant, Income Producing Management of Oklahoma, Inc., on plaintiff's claims under Title VII of the 1964 Civil Rights Act, as amended, Title 42, United States Code, Section 2000e, the Americans With Disabilities Act of 1990, Title 42, United States Code, Section 12112(a) and for state pendent claims for Intentional and Negligent Infliction of Emotional Distress. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for Income Producing Management of Oklahoma, Inc., and against

Plaintiff, Reginald Charles Horner.

IT IS SO ORDERED this 29 of October, 1998.

H. DALE COOK
Senior, United States District Judge